No. 02-69-CFX Title: Joseph C. Roell, Petra Garibay, and James Reagan, Petitioners
v.
Jon Michael Withrow

Docketed:
July 15, 2002 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jun 28 2002	Application (02A4) to extend the time to file a petition for a writ of certiorari from July 7, 2002 to July 15, 2002, submitted to Justice Scalia.
	Jul 1 2002	Application (02A4) denied by Justice Scalia.
	Jul 8 2002	Petition for writ of certiorari filed. (Response due September 13, 2002)
	Aug 5 2002	Order extending time to file response to petition until September 13, 2002.
	Sep 13 2002	Brief of respondent Jon Michael Withrow in opposition filed.
	Sep 13 2002	Motion of respondent for leave to proceed in forma pauperis filed.
	Sep 13 2002	*Affidavit in support of mtn.IFP in route.
	Oct 1 2002	Reply brief of petitioners Joseph Roell, Petra Garibay, and James Reagan filed.
	Oct 9 2002	DISTRIBUTED for Conference of November 1, 2002
	Oct 16 2002	Affidavit of respondent in support of motion for leave to proceed IFP received.
	Nov 4 2002	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Nov 4 2002	Petition GRANTED. SET FOR ARGUMENT February 26, 2003. **********
	Dec 19 2002	Brief of petitioners Joseph C. Roell, et al. filed.
	Jan 10 2003	CIRCULATED.
	Jan 16 2003	Record filed.
	Jan 17 2003	Record filed.
	Jan 21 2003	Brief of respondent Jon Michael Withrow filed.
	Feb 19 2003	Reply brief of petitioners Joseph Roell, Petra Garibay, and James Reagan (TBP) filed.
	Feb 26 2003	ARGUED.

IPP

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Supreme Court, U.S.
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02-69 JUL 8 2002

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No. _____

In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a district court, upon the plaintiff's written consent, refers a case to a magistrate judge for trial, *see* 28 U.S.C. §636(c), and all parties, the magistrate judge, and the jury proceed in a manner consistent with that referral, must a court of appeals *sua sponte* vacate the judgment for lack of jurisdiction because defendants did not expressly consent, or can defendants cure that alleged defect by confirming, in a post-judgment filing with the district court, their consent to trial before the magistrate judge?

LIST OF PARTIES

The caption for this petition includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 14.1(b). Petitioners note, however, that the Fifth Circuit caption lists a fourth "Defendant-Appellee," Jerry Ballard. App. 1a. Ballard was not a party in the Fifth Circuit.

Plaintiff Withrow's claims against Ballard were dismissed prior to service and, therefore, Ballard never appeared at trial or in the Fifth Circuit. *See* R.713, 809.[1] Although the final judgment vacated by the Fifth Circuit reflects Ballard's pre-service dismissal, App. 28a, Withrow did not contest the dismissal on appeal. Because Ballard was never served, never appeared in the trial court or Fifth Circuit, and his dismissal was not challenged by Withrow, Petitioners do not list Ballard as a party "to the proceeding in the court whose judgment is sought to be reviewed." SUP. CT. R. 14.1(b).

1. References to documents that are in the Fifth Circuit record, but not included in the Appendix, will be designated "R.[page #]."

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Contents iii

Index of Authorities v

Petition for Writ of Certiorari 1

Citation of Opinions and Orders 1

Basis for Jurisdiction 2

Statutory Provision Involved 2

Statement of the Case 2

Summary of Argument 6

Argument 8

I. The Fifth Circuit's Decision Raises Important and Unsettled Questions About the Type of Consent Required To Invoke Magistrate Judges' Civil-Trial Authority Under 28 U.S.C. §636(c) 8

A. The Court Should Resolve the Circuit Split Over Post-Judgment Consent 9

B. Legislative History Demonstrates that Congress's Concern Was Coercion, Not the Formalities of Consent 15

II. The Court Should Decide Whether §636(c) Implicates Subject-Matter Jurisdiction and Requires Appellate Courts To Nullify Judgments, *Sua Sponte*, for Lack of Consent 18

Conclusion 23

APPENDIX

Opinion 1a

Limited Remand Order 12a

Order Adopting Findings of Magistrate Judge 14a

Memorandum and Recommendation 16a

Plaintiff Withrow's Consent to Proceed Before a Magistrate Judge 20a

Order of Reference 21a

Defendants Roell, Garibay, and Reagan's Consent to Proceed Before United States Magistrate Judge 22a

Excerpt from Order Denying Defendants' Motion for Summary Judgment 25a

Excerpt from Trial Transcript 27a

Final Judgment 28a

INDEX OF AUTHORITIES

Cases

Am. Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381 (CA7 1995) 10

Ambrose v. Welch, 729 F.2d 1084 (CA6 1984) 13

Archie v. Christian, 808 F.2d 1132 (CA5 1987) (en banc) 13, 20, 22

Caprera v. Jacobs, 790 F.2d 442 (CA5 1986) (per curium) 11, 12

Clark v. Poulton, 963 F.2d 1361 (CA10 1992) 19, 21, 22

Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878 (CA7 1998) 10

Gen. Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485 (CA11 1997) 10

Gomez v. United States, 490 U.S. 858 (1989) 20

Hajek v. Burlington N. R.R. Co., 186 F.3d 1105 (CA9 1999) 5, 6, 10, 11

In re Griego, 64 F.3d 580 (CA10 1995) 19, 22

Kadonsky v. United States, 216 F.3d 499 (CA5 2000), *cert. denied*, 531 U.S. 1176 (2001) 16

King v. Ionization Int'l, Inc., 825 F.2d 1180 (CA7 1987) 10, 13, 15, 16

Kofoed v. Int'l Bhd. of Elec. Workers, Local 48, 237 F.3d 1001 (CA9 2001) 11, 13, 16, 19

Mark I, Inc. v. Gruber, 38 F.3d 369 (CA7 1994) 10

McNab v. J. & J. Marine, Inc.,
240 F.3d 1326 (CA11 2001) 19

N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.,
996 F.2d 21 (CA2 1993) 13, 16

Peretz v. United States, 501 U.S. 923 (1991) ..... *passim*

Rembert v. Apfel, 213 F.3d 1331 (CA11 2000) 10, 13

Silberstein v. Silberstein, 859 F.2d 40 (CA7 1988) 10, 16

Smith v. Shawnee Library Sys.,
60 F.3d 317 (CA7 1995) 10-13

Withrow v. Roell, 288 F.3d 199 (CA5 2002) ..... *passim*

Statutes and Rules

28 U.S.C. §636 ..... 1, 20

28 U.S.C. §636(b)(3) 20

28 U.S.C. §636(c) ..... *passim*

28 U.S.C. §636(c)(1) 2, 3, 15

28 U.S.C. §636(c)(2) 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 19

28 U.S.C. §1331 ..... 18, 22

42 U.S.C. §1983 2

FED. R. CIV. P. 73 16

FED. R. CIV. P. FORM 34 16

SUP. CT. R. 10(a) 1, 7

SUP. CT. R. 10(c) 1, 7

SUP. CT. R. 14.1(b) ii

Other Authorities

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES (1993 & Supp. 1994) 13, 16

Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary, 96th Cong. (1979) ..... *passim*

Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979) 8

H.R. REP. NO. 101-734 (1990) 17

H.R. REP. NO. 96-287 (1979) 17, 22

Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) 17

MAGISTRATE JUDGES DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (3d ed. 1999) 8-9, 21, 22

S. CONF. REP. NO. 96-322 (1979) 17

S. REP. NO. 96-74 (1979) 8, 14, 17

PETITION FOR WRIT OF CERTIORARI

The courts of appeals are divided on the validity of a party's post-judgment consent to trial before a magistrate judge pursuant to 28 U.S.C. §636(c). The Fifth Circuit erroneously vacated a judgment after determining, *sua sponte*, that two parties did not expressly consent to the magistrate judge's authority prior to trial. The court disregarded the parties' post-judgment confirmation of consent, creating a square conflict with the Seventh and Eleventh Circuits, which consistently effectuate consent offered after judgment—even for the first time on appeal. The Ninth Circuit, like the Fifth, has rejected post-judgment consent; but its prohibition has been directed at statements outside the district-court record, not a post-judgment, trial-court filing, which occurred in this case. The conflict over post-judgment consent injects uncertainty into §636(c)'s civil-trial scheme, which is designed to promote speedy justice, not multiply proceedings. And further uncertainty arises from the Fifth Circuit's "jurisdictional" perception of consent, which is inconsistent with the Tenth Circuit's views on §636.

Both the Fifth Circuit's rigid interpretation of §636(c)—and its perception that consent controls subject-matter jurisdiction—raise significant questions about magistrate judges' civil-trial authority under §636(c). The Court should grant the petition for writ of certiorari to resolve these important and unsettled questions of federal law. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS AND ORDERS

The Fifth Circuit's opinion is reported as *Withrow v. Roell*, 288 F.3d 199 (CA5 2002). App. 1a. The Fifth Circuit's limited remand order is unreported. App. 12a. Also unreported are the district court's order on remand adopting the magistrate judge's report and recommendation on consent, App. 14a, and the report and recommendation itself. App. 16a. The magistrate judge's final judgment on the merits, which the Fifth Circuit vacated for lack of consent, is unreported. App. 28a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on April 8, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

"Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. §§636(c)(1)-(2).

STATEMENT OF THE CASE

Jon Michael Withrow, an inmate in custody of the Texas Department of Criminal Justice (TDCJ), brought this *pro se* suit under 42 U.S.C. §1983 alleging that various TDCJ doctors and

nurses were deliberately indifferent to his medical needs when he injured an ankle dismounting his cell bunk.

Prior to service on defendants, Withrow filed written consent to trial before a magistrate judge pursuant to 28 U.S.C. §636(c). App. 20a.[2] The district court referred the action to a magistrate judge for all purposes, including trial and entry of final judgment, but noted that the reference would be vacated if defendants, upon service, did not consent. App. 21a.

After being served and answering, Defendants Joseph C. Roell, M.D., Petra Garibay, L.V.N., and James Reagan, M.D., filed motions for summary judgment, which the magistrate judge denied. The magistrate judge's order confirmed that "[b]y order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. §636(c)(1)." App. 26a. At no point did any of these Defendants, or Plaintiff Withrow, object to the magistrate judge's representation of her authority.

At a subsequent status conference, the parties discussed the need for a newly added defendant's consent,[3] and the magistrate judge represented that "all of the other parties have consented" to her presiding at trial. App. 4a. Again, Defendants Roell, Garibay, and Reagan did not contest their consent, and neither did Withrow.

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2. Withrow also executed a consent form at a pre-service, screening hearing, R.821, but that first form is not in the record. At the hearing, an assistant attorney general appearing for the State of Texas as *amicus curiae* did not execute a consent form on behalf of the TDCJ employees named in Withrow's complaint because they had not been served, were not parties, and thus were not yet represented by the Office of the Attorney General. *See id.*

3. This added defendant, Danny Knutson, settled with Withrow before trial, mooting the issue of his consent.

Withrow's claims against Defendants Roell, Garibay, and Reagan proceeded to trial before a jury, with the magistrate judge presiding and Withrow representing himself. On the first day of trial, the magistrate judge informed the jurors: "In this case—or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning." App. 27a. Consistent with all prior proceedings, no party objected to the magistrate judge's authority.

After hearing the evidence, the jury returned a unanimous verdict for Defendants Roell, Garibay, and Reagan, and the magistrate judge entered a final judgment in their favor. App. 28a. Withrow appealed, *pro se*, but prior to briefing the Fifth Circuit remanded the case, *sua sponte*, for the limited purpose of determining whether all parties had consented to trial before the magistrate judge. App. 12a-13a. The remand order noted that the record contained written consent by Plaintiff Withrow and Defendant Reagan, but not the other defendants. App. 13a. Accordingly, the Fifth Circuit instructed the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." *Id.*

On remand, Defendants Roell, Garibay, and Reagan filed written consent in the district court, expressly stating their "consent to have this case heard by the United States Magistrate Judge . . . for all purposes, including entry of judgment and jury trial." App. 22a. They also expressly confirmed "that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." *Id.*

The magistrate judge prepared a memorandum and recommendation for the district court, finding that Defendant

Reagan was the only defendant who timely filed written consent.[4] Regarding Defendants Roell and Garibay, the magistrate judge noted that "by their actions they clearly implied their consent to the jurisdiction of a magistrate," but that "implied consent does not confer jurisdiction" and Fifth Circuit precedent precludes curing that defect through belated, express consent. App. 19a.[5]

Defendants objected to the magistrate judge's report, but the district court adopted her findings and conclusions, agreeing that "Defendants Roell and Garibay did not expressly consent before trial" and that "belated consent is insufficient to cure this jurisdictional defect." App. 14a (citing *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (CA9 1999)).

The Fifth Circuit affirmed. Despite Plaintiff Withrow's and Defendant Reagan's express, pre-trial, written consent to proceed before the magistrate judge—and the express, post-judgment consent of Defendants Roell and Garibay—the Fifth Circuit

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4. The magistrate judge's order for service of process had directed each defendant to answer and to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. App. 17a. Defendant Reagan, then represented by private counsel, filed an answer and a separate statement consenting to trial before the magistrate judge. Defendants Roell and Garibay, both represented by the Texas Office of the Attorney General, filed answers but did not include a statement regarding consent. At the time of remand, all three Defendants, now represented by the same assistant attorney general, filed a written statement confirming their consent to proceed before the magistrate judge at all times prior and subsequent to entry of judgment. App. 22a.

5. The magistrate judge also determined that Roell and Garibay had not orally consented at hearings, App. 17a, and the Fifth Circuit held that this finding was not clearly erroneous. App. 4a-5a. Petitioners do not challenge the oral-consent finding, *per se*, in their petition for writ of certiorari.

determined that the magistrate judge lacked jurisdiction to try the case and enter judgment on the jury's verdict, requiring a remand for new trial. Acknowledging that the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective under 28 U.S.C. §636(c), the Fifth Circuit rejected these decisions as "contrary to the statute." App. 5a-10a. Like the district court, the Fifth Circuit referenced the Ninth Circuit's refusal to consider belated consent in *Hajek*, App. 6a, and aligned itself with that court. The Fifth Circuit also went further and specified that consent to a §636(c) referral must be not only express but in writing, filed before trial commences, to confer jurisdiction for the magistrate judge to preside and enter judgment. App. 11a.

In rejecting the Seventh and Eleventh Circuits' approach—under which belated, express consent cures technical defects in §636(c) referrals—the Fifth Circuit recognized that its repudiation of post-judgment, confirmatory consent imposes significant costs: "Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system." App. 10a.

SUMMARY OF ARGUMENT

The Fifth Circuit's categorical rejection of post-judgment consent conflicts with the better reasoned decisions of the Seventh and Eleventh Circuits and thwarts the goals of the Federal Magistrate Act of 1979. By expanding magistrate judges' civil-trial authority, Congress sought to promote judicial efficiency and provide an alternative forum for speedy resolution of civil suits. Congress made consent the lynchpin of magistrate judges' new power, but insisted only that consent be voluntary, not that parties manifest consent in a particular manner.

Despite Congress's concern with voluntariness, not formality, the Fifth Circuit adopted a formalistic approach to consent that prohibits parties from expressly confirming—post-judgment—their

voluntary and knowing consent to proceed before a magistrate judge. In this case, the rule defeats Plaintiff Withrow's and all Defendants' trial expectations, nullifies a jury verdict, and burdens the federal docket by sending the parties back to relitigate claims already adjudicated on the merits. This perverse result is not commanded by the text of §636(c), and it defeats Congress's goal of facilitating speedy justice.

By squarely conflicting with decisions of the Seventh and Eleventh Circuits—and pushing the envelope of the Ninth Circuit's more limited rejection of post-judgment consent—the Fifth Circuit's stance exacerbates uncertainty over the type of consent necessary to effectuate magistrate judges' authority to conduct civil trials pursuant to 28 U.S.C. §636(c). This is inconsistent with Congress's desire for litigants in all federal courts—regardless of the governing circuit—to enjoy an equal opportunity to expedite litigation through the voluntary use of magistrate judges.

Additionally, the Fifth Circuit's *sua sponte* investigation into consent confuses statutory referral requirements with subject-matter jurisdiction. The Tenth Circuit, by contrast, has held that defects in referral procedures are not jurisdictional errors. This disagreement over subject-matter jurisdiction, along with the circuit conflict over post-judgment consent, warrant the Court's attention. The Court should grant the petition for writ of certiorari to answer these important and unsettled questions of federal law. *See* SUP. CT. R. 10(a), (c).

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION RAISES IMPORTANT AND UNSETTLED QUESTIONS ABOUT THE TYPE OF CONSENT REQUIRED TO INVOKE MAGISTRATE JUDGES' CIVIL-TRIAL AUTHORITY UNDER 28 U.S.C. §636(C).

In 1979, Congress amended 28 U.S.C. §636 to authorize federal magistrate judges to conduct and enter final judgments in civil trials. *See* Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979). In expanding magistrate judge's authority, Congress aimed "to improve access to the Federal courts," *id.*, provide relief to overburdened district judges, and "prevent inattention to a mounting queue of civil cases pushed to the back of the docket." S. REP. NO. 96-74, at 4 (1979).

To protect individual litigants' rights and the integrity of the Article III district court, magistrate judges' new authority was contingent on two factors: (1) the parties' consent; and (2) a special designation by the district court. *See* Pub. L. No. 96-82, §2(2), 93 Stat. at 643 (codified as amended at 28 U.S.C. §636(c)(1)). The consent requirement was critical, since litigants would be waiving their right to proceed before an Article III judge. *See, e.g., Peretz v. United States*, 501 U.S. 923, 931 n.8 (1991); S. REP. NO. 96-74, at 4; *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary*, 96th Cong. 375-80 (1979) [hereinafter "*1979 Hearings*"] (report of U.S. Department of Justice, Office for Improvements in the Administration of Justice (Jan. 19, 1978) [hereinafter "D.O.J. Report"]).[6]

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6. The federal courts of appeals have consistently upheld the constitutionality of magistrate-judges' civil-trial authority, with parties' consent, under §636(c). *See* MAGISTRATE JUDGES DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 148-50 (3d ed. 1999) [hereinafter "INVENTORY OF DUTIES"] (collecting cases). The constitutionality of §636(c) has never been questioned in this case by any party or the Fifth Circuit.

Congress did not, however, specify the form of consent a litigant must give to authorize a referral under §636(c). This is not surprising, because the legislative history of §636(c)(1) does not reveal an overriding concern with the formalities of consent. Rather, the goal was to ensure the voluntariness of consent and devise safeguards to prevent courts from coercing litigants to consent to magistrate-judge referrals against their wishes. *See infra* Part I.B.

The Seventh and Eleventh Circuits' acceptance of post-judgment consent protects parties' interests, promotes judicial efficiency, and satisfies the statutory scheme for civil-trial referrals established in §636(c). By contrast, the Fifth Circuit's rigid construction of §636(c) exalts form over substance to the detriment of the parties, the district courts, and magistrate judges.

This Court previously has recognized "the importance of magistrates to an efficient federal court system." *Peretz*, 501 U.S., at 929. To preserve the effectiveness of magistrate judges' vital role—and to promote consistency in parties' utilization of this valuable resource—the Court should determine whether post-judgment consent ensures the validity of judgments rendered pursuant to §636(c).

A. The Court Should Resolve the Circuit Split Over Post-Judgment Consent.

The Fifth Circuit's rejection of post-judgment consent squarely conflicts with decisions of the Seventh and Eleventh Circuits, which have repeatedly deemed post-judgment consent effective

under §636(c). *Compare Withrow*, 288 F.3d, at 203-04 (rejecting permissibility of post-judgment filing confirming parties' pre- and post-trial consent), *with, e.g., Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 883 (CA7 1998) (holding that parties' consent following appellate oral argument satisfied §636(c)'s consent requirement); *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (CA11 1997) (holding post-judgment consent effective when parties withdrew their request for a new trial, thereby accepting the magistrate judge's authority to enter judgment); *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (CA7 1995) (accepting statement of consent in party's supplemental appellate filing); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (CA7 1995) (stating that appellate court must accept parties' offer to cure lack of consent by submitting a belated consent after appellate oral argument); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (CA7 1987) (relying on parties' joint stipulation to magistrate judge's authority filed weeks after entry of the appealed order); *cf. Rembert v. Apfel*, 213 F.3d 1331, 1335 & n.1 (CA11 2000) (reconfirming that "[p]arties can consent even after judgment" but dismissing appeal when party would not consent at oral argument); *Mark I, Inc. v. Gruber*, 38 F.3d 369, 371 (CA7 1994) (vacating judgment when party was offered a belated opportunity to consent on appeal but declined to do so); *Silberstein v. Silberstein*, 859 F.2d 40, 41-43 (CA7 1988) (recognizing that absence of consent can be "cured" when parties "stipulate *after* judgment that they had previously consented," but vacating judgment when the record contained no such stipulation).

Although the Fifth Circuit's prohibition against post-judgment consent clashes with the views of the Seventh and Eleventh Circuits, it is generally consistent with the Ninth Circuit's approach in *Hajek*. 186 F.3d, at 1108 & n.9 (rejecting party's attempt to consent, in its appellate brief, to a magistrate judge's trial authority). The Fifth and Ninth Circuits' views on consent are not, however, identical. Whereas the Fifth Circuit categorically bans

post-judgment consent and requires pre-trial consent to be in writing, App. 7a-11a, the Ninth Circuit has not been so rigid. That court declined, in *Hajek*, to foreclose the possibility that post-judgment consent might satisfy §636(c) in certain circumstances. Indeed, the Ninth Circuit recently gave credence to post-judgment written consent when it was filed in the district court and the party also had orally consented prior to the magistrate judge's dispositive ruling. *See Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (CA9 2001).

The Fifth Circuit, therefore, stands at the extreme of the circuit spectrum. And its unforgiving stance is driven by two fundamental misconceptions: first, that defining consent solely by *pre-trial* express statements prevents "gamesmanship"; and, second, that accepting post-judgment consent would impermissibly imply consent from a party's conduct. App. 8a-10a. The Fifth Circuit is mistaken on both counts.

The potential for gamesmanship is not eliminated by requiring pre-trial consent, as the Fifth Circuit erroneously reasoned. App. 9a (concluding that post-judgment consent allows parties to withhold consent until a verdict is reached and then decide whether to consent based on the outcome, but that requiring pre-trial consent removes that potential for abuse). As the Seventh Circuit has recognized, the potential for "strategy games" exists under any rule. *Smith*, 60 F.3d, at 321. Thus, "if we did not accept late consents, a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost." *Id.*

Indeed, the Fifth Circuit has encountered such strategic maneuvers. In *Caprera v. Jacobs*, 790 F.2d 442 (CA5 1986) (per curium), the court reluctantly vacated a magistrate judge's dismissal of plaintiffs' §1983 suit when all original parties consented to the magistrate judge's civil-trial authority but a defendant added by plaintiffs in an amended complaint neglected to file a form. After the magistrate judge granted defendants' Rule 12(b)(6) motion and

dismissed plaintiffs' claims, the plaintiffs protested his authority, citing the added defendant's failure to file written consent. As the Fifth Circuit bemoaned:

> "We recognize that it is unfair to allow a party, as the plaintiffs did here, to remain silent on the jurisdictional problem while awaiting the magistrate's decision, knowing it will get a second chance from the appellate court should the magistrate rule against the party. This court does not favor giving such parties 'a second bite at the apple.' However, when the objection is to jurisdiction, it cannot be waived." *Id.*, at 445.[7]

Recognizing the potential for gamesmanship under any rule, the Seventh Circuit has declined to "write a treatise on game theory," *Smith*, 60 F.3d, at 321, or let suspicion of parties' motives determine its views on consent. Its steadfast acceptance of post-judgment consent is the most appropriate approach—not because it solves the problem of gamesmanship, but because it best satisfies the goals underlying the Federal Magistrate Act. It effectuates the parties' express, voluntary consent; and it ensures effective use of judicial resources. This is particularly true when, as in Withrow's suit, all parties proceed before a magistrate judge in a manner consistent with consent; and the only parties who previously did not express consent on the record do so, post-judgment.

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7. Technical defects in consensual referrals implicate a magistrate judge's authority, not the subject-matter jurisdiction of the district court. *See infra* Part II. The *Caprera* plaintiffs objected to the magistrate judge's authority post-judgment, both in a Rule 60(b) motion and on appeal, placing the issue of consent squarely before the Fifth Circuit. But when, as in this case, no party contests consent, an appellate court should not raise the issue *sua sponte*. *See id.*

Moreover, post-judgment consent is not "implied" from the parties' conduct, as the Fifth Circuit erroneously concluded.[8] App. 9a-10a. Rather, it is an express statement of parties' agreement to proceed before a magistrate judge. *See Smith*, 60 F.3d, at 321 ("A late-submitted consent is 'an unequivocal representation that the magistrate was acting with the parties consent.'") (quoting *King*, 825 F.2d, at 1185). As the Seventh Circuit has observed, "while many courts (including our own) refuse to infer consent from the parties' behavior, and some have even insisted (without basis in the statute) on 'a clear statement by the parties,'" post-judgment consent "*is* a clear statement by the parties" and satisfies those concerns. *King*, 825 F.2d, at 1185 (citation omitted). Post-

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8. Courts have generally agreed with the Fifth Circuit's view that consent under §636(c) must be express, not implied. *See, e.g., Kofoed*, 237 F.3d, at 1004; *Rembert*, 213 F.3d, at 1334; *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 21, 24 (CA Cir.1993); *King*, 825 F.2d, at 1185; *Ambrose v. Welch*, 729 F.2d 1084, 1085 (CA6 1984) (per curiam). *But see Archie v. Christian*, 808 F.2d 1132, 1137 (CA5 1987) (en banc) (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceeded to trial before a magistrate judge but failed to execute written consent, and "no parties objected to the magistrate's having presided over the trial, although they were well aware that a magistrate had presided . . . . [i]n every real sense they consented").

Notwithstanding courts' aversion to implied consent, the Judicial Conference Committee on the Administration of the Magistrate Judges System has endorsed "opt out" systems in which cases are randomly referred to magistrate judges and a party must expressly object to the referral if they wish to proceed instead before an Article III judge. COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES 3-4 (1993 & Supp. 1994) [hereinafter "LONG RANGE PLAN"].

judgment consent may confirm what previously was implicit in the parties' conduct, but that does not render it implied consent.

The post-judgment consent filed by Defendants Roell, Garibay, and Reagan in the district court not only was consistent with their consensual conduct before the magistrate judge, but also was an unequivocal declaration of express consent:

> "Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." App. 22a.

This express statement unconditionally confirmed Defendants' consent to proceed before the magistrate judge in accordance with §636(c), and it should have settled any question of the magistrate judge's authority to enter final judgment—as it would have in the Seventh and Eleventh Circuits. But such is not the case for litigants like Defendants Roell, Garibay, and Reagan who are sued in jurisdictions bound by the Fifth Circuit's rule.

Indeed, the circuit conflict over post-judgment consent will produce inconsistent results whenever parties knowingly and voluntarily try their case to a magistrate judge without formalizing their pre-trial consent. This defeats Congress's intent to provide "all parties in the district courts [with] equal opportunity to avail themselves of the new provisions to expedite the disposition of litigation." S. REP. NO. 96-74, at 13. To protect parties' rights, conserve judicial resources, and preserve "the importance of magistrates to an efficient federal court system," *Peretz*, 501 U.S., at 929, the Court should grant the petition for writ of certiorari and

resolve whether post-judgment consent confirms a magistrate judge's civil-trial authority under §636(c).

B. Legislative History Demonstrates That Congress's Concern Was Coercion, Not the Formalities of Consent.

The Fifth Circuit erroneously determined that both the plain language in §636(c) and the statute's legislative history compelled the court's rejection of post-judgment, confirmatory consent. App. 8a-10a. Congress, however, was concerned with preventing coercion, not dictating the manner in which parties agree to try their case before a magistrate judge.

As the Seventh Circuit has correctly observed, §636(c) "does not require a specific form or time of consent or even that it be in writing (unless the jurisdiction is to be exercised by a part-time magistrate)." *King*, 825 F.2d, at 1185; *see also* 28 U.S.C. §636(c)(1). The magistrate judge who presided over Withrow's trial was not part-time; therefore, written consent was not statutorily required to invoke her authority.

The Fifth Circuit misconstrued §636(c)'s language that "[u]pon the consent of the parties" magistrate judges "may conduct" civil trials and enter final judgments. App. 8a (quoting 28 U.S.C. §636(c)(1)). The court reasoned that post-judgment consent is "contrary to the scheme established by this language," because consent is a "condition precedent" to the magistrate judge's assuming a §636(c) role. App. 8a. Petitioners agree that a magistrate judge cannot act under §636(c) without the parties' consent, but dispute the court's inference that post-judgment consent is inconsistent with Congress's vision.

Neither Withrow nor Defendants contend that the magistrate judge acted at any time without their consent. Although Defendants Roell and Garibay did not expressly confirm consent until after judgment, App. 22a, that does not mean they did not previously

consent to proceed before the magistrate judge—to whom the case already was referred at the time of service. App. 21a.

The "upon the parties consent" language in §636(c) does not require an immediate, written expression of consent. *See King*, 825 F.2d, at 1185 (noting that while some courts insist on "a clear statement by the parties," that requirement is "without basis in the statute").[9] Rather, that language prohibits referrals to magistrate judges against the parties' wishes.

The legislative history of the Federal Magistrate Act of 1979 is replete with discussions about consent that consistently focus on its voluntariness, not its form. The Joint Explanatory Statement of the Committee of Conference to the House and Senate is particularly instructive:

9. Federal Rule of Civil Procedure 73, which complements §636(c), instructs parties to file written consent and includes a model form to submit to clerks of court. *See* FED. R. CIV. P. 73; *id.* Form 34. A magistrate judge's authority, however, comes from the statute, not this rule. Thus, many courts, including the Fifth Circuit, have not enforced strict compliance with the rule when the record otherwise documents consent. *See, e.g., Kofoed*, 237 F.3d, at 1004 (referencing Rule 73 but deeming adequate pre-judgment oral consent confirmed by post-judgment written consent); *Kadonsky v. United States*, 216 F.3d 499, 502 (CA5 2000) (accepting consent of party who did not sign the form officially recognized by Rule 73 because "he did sign a document evincing his willingness to proceed before a magistrate judge"), *cert. denied*, 531 U.S. 1176 (2001); *Silberstein*, 859 F.2d, at 43 (referencing Form 34 and expressing a preference for, but not requiring, written consent). *But see N.Y. Chinese TV Programs*, 996 F.2d, at 23-24 (emphasizing Rule 73's literal requirements). The Judicial Conference Committee on the Administration of the Magistrate Judges System has suggested that Rule 73 be amended to eliminate the written consent requirement. *See* LONG RANGE PLAN, at 4.

> "[T]he *voluntary* consent of the parties is required before a civil action may be referred to a magistrate for final decision. . . . The conferees felt that because of the possibility of coercion a strong warning should remain in the legislation that neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference . . . . [R]ules of the court must include procedures to *protect the voluntariness, knowingness, and willingness* of the consent. . . . [O]nce pretrial proceedings have commenced before a district judge or magistrate, the parties could consent to trial by a magistrate before either of these judicial officers. Of course, they also could return to the clerk's office and file their consent there. Again, in this circumstance, no coercion is to be tolerated." S. CONF. REP. NO. 96-322, at 7-8 (1979) (emphasis added).

Other discussions of voluntariness abound. And all focus on preventing coercion, not formalizing consent. *See, e.g.*, S. REP. NO. 96-74, at 5 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates."); H.R. REP. NO. 96-287, at 2 (1979) ("The bill makes clear that the knowing and voluntary consent of the parties is required before any civil action may be referred to a magistrate; no coercion will be tolerated.").[10]

10. When Congress's fears of coercion were not borne out in practice, it amended §636(c) in 1990 to permit magistrate and district judges to encourage parties to consent to referrals, provided the encouragement was not coercive. *See* Pub. L. No. 101-650, §308(a)(2), 104 Stat. 5089, 5112 (1990) (codified at 28 U.S.C. §636(c)(2)); H.R. REP. NO. 101-734, at 27 (1990). No amendments to §636(c) since the Federal Magistrate Act of 1979 have added specifications regarding the form of consent.

Congress's concerns about voluntariness are satisfied in this case by all parties' express consent—whether pre-trial or post-judgment—coupled with indicia of consent from their litigating this case in a manner consistent with consensual referral. Neither Plaintiff Withrow, nor any defendant, alleges coercion. And all parties received the benefit of their bargain: expedient resolution before a magistrate judge.

The Fifth Circuit's effort to engraft formalities onto §636(c) is inconsistent with the parties' expectations and Congress's intent. Nothing in the statute or legislative history prohibits post-judgment consent, and the interests of justice and judicial economy are best served by respecting the final judgment entered by the magistrate judge in this case.

II. THE COURT SHOULD DECIDE WHETHER §636(C) IMPLICATES SUBJECT-MATTER JURISDICTION AND REQUIRES APPELLATE COURTS TO NULLIFY JUDGMENTS, *SUA SPONTE*, FOR LACK OF CONSENT.

Neither Plaintiff Withrow, the Defendants, nor the magistrate judge questioned the parties' consent in the district court. Yet, when Withrow appealed from the adverse jury verdict and judgment, the Fifth Circuit raised the issue of consent *sua sponte*: "When the magistrate judge enters final judgment in a suit pursuant to 28 U.S.C. §636(c), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived." App. 12a-13a.

Initiating the consent inquiry, the Fifth Circuit equated lack of consent with lack of subject-matter jurisdiction, which requires *sua sponte* consideration. But the trial court's subject-matter jurisdiction in this case was premised on federal-question jurisdiction, *see* 28 U.S.C. §1331, not any provision of the Federal Magistrate Act. And the Fifth Circuit's identification of an alleged defect in the statutory referral procedure—to which no party

objected—did not nullify the federal question that conferred subject-matter jurisdiction over Withrow's §1983 suit.[11]

Unlike the Fifth Circuit, the Tenth Circuit has correctly recognized that "[a] magistrate judge's lack of statutory authority is not a jurisdictional defect." *In re Griego*, 64 F.3d 580, 583 (CA10 1995) (holding that party's objection that the magistrate judge acted without a proper order of referral under §636(b) did not implicate subject-matter jurisdiction); *see also Clark v. Poulton*, 963 F.2d 1361, 1366-67 (CA10 1992) (distinguishing statutory authority under §636 from subject-matter jurisdiction). Thus, in the Tenth Circuit, alleged errors in a referral procedure are waived if not raised in the district court. *In re Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67.

Regarding Withrow's suit, no litigant objected that the referral was defective for lack of consent. Thus, that alleged defect should be deemed waived—particularly when, as here, all parties not only proceeded in a manner consistent with consent, but also expressly

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11. Other courts of appeals have examined consent *sua sponte*, but framed the inquiry in terms of their own appellate jurisdiction, which is limited to appeals from final judgments. *See* 28 U.S.C. §1291. These courts conclude that, absent consent, the magistrate judge had no authority to enter a final judgment; therefore, no reviewable order exists on appeal. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001); *Kofoed*, 237 F.3d, at 1003-04. This justification for *sua sponte* consideration is also flawed. When a party appeals a judgment rendered by a magistrate judge pursuant to §636(c), there is a facially valid judgment within the meaning of §1291 before the court of appeals. Thus, no *sua sponte* need to consider jurisdiction exists as it would, for example, with facially interlocutory orders appealable solely under §1291's collateral-order exception. When a final judgment facially satisfies §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court.

confirmed consent pre- or post-trial. *See Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceed to trial before a magistrate judge but fail to execute written consent, "I would neither find this violation of the rule to be 'jurisdictional' and not waivable, nor so substantial that we ought to consider it, *sua sponte*").

Although this Court has described magistrate judges' trial authority under §636(c) in terms of "expanded jurisdiction," it did so while discussing the scope of statutorily authorized duties, not *subject-matter* jurisdiction. *Gomez v. United States*, 490 U.S. 858, 870 (1989) (contrasting Congress's explicit grant of consensual civil-trial authority under §636(c) with delegation of felony-trial duties under §636(b)(3)). Similarly, while §636 is captioned "Jurisdiction, powers, and temporary assignment," the statute's provisions address magistrate-judge authority, not subject-matter jurisdiction. *See* 28 U.S.C. §636. This is understandable because "'jurisdiction' is a many-hued term":

> "[The Court] used it in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act." *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting) (citation omitted).[12]

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12. Justice Scalia's dissent was the only opinion in *Peretz* to discuss the distinction between statutory authority and subject-matter jurisdiction—an analysis the majority did not refute. And, although *Peretz* involved the delegation of *voir dire* supervision in a felony trial pursuant to 28 U.S.C. §636(b)(3), not a referral to a magistrate judge for trial and entry of judgment pursuant to §636(c), Justice Scalia's jurisdictional reasoning still resonates because "the jurisdiction exercised by magistrates at trial is clearly that of the Article III federal district court." D.O.J. Report, at 375; *see also* INVENTORY OF DUTIES, at 1.

Indeed, the Tenth Circuit has drawn on Justice Scalia's reasoning in *Peretz* to conclude that errors regarding magistrate judges' statutory authority do not deprive a court of subject-matter jurisdiction. *See Clark*, 963 F.2d, at 1367 (quoting *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting)).

Congress was aware of the distinction between a district court's subject-matter jurisdiction and a consensual referral to a magistrate judge when it expanded magistrate judges' civil-trial authority in 1979. As a Department of Justice report submitted to Congress explained, "[i]t is the court, not the judge, to which these doctrines of subject-matter jurisdiction apply":

> "The magistrate exercises no independent jurisdiction. . . . The magistrate exercises only that subject-matter jurisdiction which is authorized by the Constitution, delegated to the district court by Act of Congress, and designated by the court itself to be available through its magistrate with the consent of the parties. . . .
>
> Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration on trial procedure, not to a transfer of jurisdiction from the district court to another tribunal." D.O.J. Report, at 376 (citation omitted).

Accordingly, when consent to trial before a magistrate judge is invalid, the only risk it poses is "to the authority of the court or the rights of the litigants," not subject-matter jurisdiction. *Id.*

Other contemporaneous congressional sources echo this theme. *See* H.R. REP. NO. 96-287, at 8 ("[T]he magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate."); *1979 House Hearings*, at 385 (Judicial Conf. of the U.S., Comm. on the Admin. of the Fed. Magistrate Sys. (Jan. 30-31, 1978), Comments on S. 1613—The Magistrate Act of 1977) [hereinafter "Judicial Conf. Comments"] (same).

The district court that referred Withrow's case to the magistrate judge had subject-matter jurisdiction because Withrow brought federal constitutional claims under §1983. *See* 28 U.S.C. §1331. And it was the district court's subject-matter jurisdiction that the magistrate judge exercised pursuant to the §636(c) referral. *See* H.R. REP. NO. 96-287, at 8; D.O.J. Report, at 375-76; Judicial Conf. Comments, at 385; INVENTORY OF DUTIES, at 1.

At the time the case was referred to the magistrate judge for trial, only Plaintiff Withrow had consented in writing because no defendants had yet been served. If that referral was defective because all parties had not yet filed written consent, the defect went only to the lawfulness of the referral, not subject-matter jurisdiction. *See In re Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67; *cf. Peretz*, 501 U.S., at 953 (Scalia, J., dissenting); *Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring).

The Fifth Circuit's elevation of a statutory referral defect to an issue of subject-matter jurisdiction provides litigants like Withrow an unwarranted litigation windfall. Although Withrow expressly consented to the magistrate judge's authority, never alleged lack of consent by Defendants, and proceeded to try his case to a jury that found against him, he now gets a second bite at the apple. That result—which unjustly comes "at the expense of the parties and the judicial system," App. 10a—should not stand.

If a "jurisdictional" approach to consent is not required, the Fifth Circuit had no obligation to investigate consent *sua sponte*, and it had no basis to vacate the judgment for lack of consent when no party raised that objection. The Court should grant the petition for writ of certiorari and determine whether judicial—and litigant—resources must be squandered when no party contends that judgment was rendered without its consent.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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July 8, 2002

[Filed April 8, 2002]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40627

JON MICHAEL WITHROW,
Plaintiff-Appellant,

v.

JOSEPH C. ROELL, JERRY BALLARD,
PETRA GARIBAY, J. REAGAN, M.D.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(C-97-CV-256)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

This matter having been referred to a magistrate judge pursuant to 28 U.S.C. § 636(c) (on referral and *upon parties' consent*, may try civil case and enter judgment), primarily at issue is whether, when all parties fail to consent pre-trial, but trial is held and judgment entered by the magistrate judge, post-judgment consent cures the pre-trial failure. Defendants contend: pre-trial, all parties consented; alternatively, their post-judgment consent confers jurisdiction on the magistrate judge. VACATED AND REMANDED.

I.

In 1997, Jon Michael Withrow, *pro se*, filed this 42 U.S.C. § 1983 action, claiming members of his prison's medical staff (Joseph Roell, Jerry Ballard, Danny Knutson, Petra Garibay, and Dr. James Reagan) acted deliberately indifferently to his medical needs, in violation of, *inter alia*, his Eighth Amendment rights. Withrow gave written consent to trial and entry of judgment by a magistrate judge.

Therefore, pursuant to 28 U.S.C. § 636(c), the district judge referred the action to a magistrate judge, but reminded that all defendants had to also consent to such participation by a magistrate judge (consent). Only Dr. Regan did so (written).

In early 1998, the magistrate judge dismissed all claims except concerning the Eighth Amendment and dismissed Ballard. (Ballard's dismissal is reflected in the final judgment entered 16 May 2000, from which this appeal is taken.) In March 1999, the magistrate judge denied summary judgement for the remaining defendants. Pre-trial, Withrow settled with Knutson; he was dismissed.

The remaining parties proceeded to trial before the magistrate judge, with a jury finding for defendants. The magistrate judge entered final judgment in May 2000, and Withrow timely appealed.

But, *sua sponte*, our court questioned whether the requisite consent had been given by all parties and ordered a limited remand for "the district court [to] determine whether the parties consented . . . and, if so, whether the consents were oral or written". *Withrow v. Roell*, No. 00-40627, at 2 (5th Cir. 21 Nov. 2000) (unpublished). Our court retained jurisdiction. *Id. See, e.g., Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1154 (5th Cir. 1982) (retaining jurisdiction pending district court compliance with remand).

On remand, the remaining defendants (Roell, Garibay, and Dr. Reagan (Defendants)) gave written consent. In a report and recommendation, the magistrate judge stated. pre-trial, Roell and Garibay never consented; and their post-judgment consent did not cure the jurisdictional defect. *Withrow v. Roell*, No. C-97-256, at 4 & n.3 (S.D. Tex. 8 Jan. 2001) (unpublished). Over Defendants' objections, the district court adopted the report and recommendation. *Withrow v. Roell*, No. C-97-256 (S.D. Tex. 1 Mar. 2001) (unpublished). Defendants' motion to reconsider was denied.

II.

"*Upon the consent of the parties*, a . . . United States magistrate [judge] . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment . . . when specially designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1) (emphasis added); *see* FED. R. CIV. P. 73 (procedures for consent and referral to a magistrate judge); FED. R. CIV. P. APPENDIX OF FORMS, Official Form 33 ("Notice of Availability of Magistrate Judge to Exercise Jurisdiction"); *id.*, Official Form 34 ("Consent to Exercise of Jurisdiction by a United States Magistrate Judge"). At issue is whether, pre-trial, Defendants consented; and, if they did not, whether their post-judgment consent is effective.

When, pursuant to § 636(c)(1), the magistrate judge enters final judgment, lack of consent and defects in the order of reference are jurisdictional errors; as such, they cannot be waived. *See Hill v. City of Seven Points*, 230 F.3d 167, 168-69 (5th Cir. 2000); *Mendes Jr. Int'l Co. v. M/V Sokai Maru*, 978 F.2d 920, 923-24 (5th Cir. 1992); *EEOC v. W. La. Health Servs., Inc.*, 959 F.2d 1277, 1281-82 & nn.3 & 4 (5th Cir. 1992). In keeping with this, § 636(c) consent must be express; it cannot be implied by the parties' conduct. *W. La. Health Servs.*, 959 F.2d at 1281; *Trufant v. Autocon, Inc.*, 729

F.2d 308, 309 (5th Cir. 1984) ("consent must be explicit, and will not be casually inferred from the conduct of the parties").

A.

Pre-trial, only Dr. Regan filed written consent. Defendants contend Roell and Garibay, pre-trial, gave consent orally. Whether they did involves a finding of fact, reviewed only for clear error. *E.g.*, *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

To show Roell and Garibay's consent, Defendants point to an April 1999 teleconference, with appearances by Withrow and Defendants' counsel, at which the magistrate judge stated to the latter: "Also, if you talk to Mr. Knutson [defendant who settled pre-trial with Withrow], . . . would you tell him . . . that he needs to let us know whether he's going to consent to my jurisdiction as well, because all defendants need to consent. . . ." Defendants' counsel responded: "Good point, yes, Your Honor". According to Defendants, the import of this colloquy is that the magistrate judge "thereby stated . . . she thought Roell, Garibay, and Dr. Reagan had all consented" and Defendants' counsel confirmed that assumption.

As further evidence of Roell and Garibay's claimed pre-trial consent, Defendants cite another magistrate judge teleconference (July 1999). Withrow and Defendants' counsel appeared, together with Knutson's counsel. The magistrate judge stated to the latter: "[Y]our client [Knutson] has the right to not consent . . : and I don't know what your position is on that. . . . [A]ll of the other parties have consented. . . ." According to Defendants, these other-parties-had-consented comments were correct.

Finally, Defendants cite to the magistrate judge's statement to the jury: "In . . . any civil case in which [the] parties consent to my jurisdiction, I do have civil jurisdiction to hear civil jury trials. . . ."

Obviously, through none of these relied upon statements did Roell and Garibay consent. At best, they represent only the magistrate judge's *assumption* that they had. On remand, the magistrate judge found she had been mistaken in her assumption that Roell and Garibay *had executed consent forms*. *Withrow v. Roell*, No. C-97-256, at 2 & n.2 (S.D. Tex. 8 Jan. 2001) (unpublished). Accordingly, the basis of her assumption had been that written, not oral, consent had been given.

In short, there is no evidence in the record of pre-trial consent by all parties. The corresponding finding is not clearly erroneous.

B.

Accordingly, we must determine whether, as the district court held, the *post-judgment* consent was *not* effective. We review this jurisdictional question *de novo*. *E.g.*, *United States v. Bustos-Useche*, 273 F.3d 622, 626-27 (5th Cir. 2001).

1.

Notwithstanding the plain language of § 636(c), discussed *infra*, Defendants note the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective. *See Rembert v. Apfel*, 213 F.3d 1331, 1335 n.1 (11th Cir. 2000) ("Parties can consent even after judgment."); *Drake v. Minn. Mineral & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998) (consent post-appellate oral argument sufficient); *Gen. Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (11th Cir. 1997) (post-judgment consent effected by parties' withdrawing their new-trial motion and thereby accepting magistrate judge's judgment; such consent effective), *cert. denied*, 523 U.S. 1055 (1998); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (7th Cir. 1995) (post-judgment consent unequivocal representation magistrate judge acting with parties' consent); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987) (post-judgment consent sufficient where parties executed consent several weeks after entry of order appealed).

The Ninth Circuit, however, has held otherwise. *See Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (9th Cir. 1999) (consent not effective where made in appellate brief). The district court cited *Hajek* in holding the post-judgment consent did not "cure the jurisdictional defect". *Withrow v. Roell*, No. C-97-256 (S.D. Tex. 1 Mar. 2001) (unpublished).

Our court's primary precedent is found in *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc), where a prisoner's civil rights action had been referred to a magistrate judge. Although trial was held without objection by plaintiff, *id.* at 1133-34, defendants did object. They ceased doing so, however, upon the jury's returning a favorable verdict. *Id.* at 1134.

By report and recommendation, the magistrate judge in *Archie* recommended that defendants' objection be overruled because the referral was proper under *28 U.S.C. § 636(b)*. Unlike § 636(c), which, as noted, allows a magistrate judge, upon a district judge's referral and the parties' consent, to enter final judgment in a civil action, § 636(b) only authorizes a magistrate judge, upon referral, to hear and determine certain pre-trial matters and to conduct an evidentiary hearing and then submit a recommendation to the district judge for disposition of an action. Accordingly, the magistrate judge recommended that the district court adopt the jury's findings. *Id.* The district court did so and entered final judgment. *Id.*

At issue before our en banc court was whether a trial before a magistrate judge without all parties' consent, followed by a district judge's entry of judgment, was a procedural error, subject to waiver, or was instead a jurisdictional error. Our court held that, although the parties had not consented, this did not deprive the district judge of *jurisdiction to enter the judgment*. *Id.* at 1135. But, our court noted: had the appeal challenged this defective, non-jurisdictional procedure, it would have been reversible error. *Id.* In

other words, the failure to challenge it resulted in the issue's not being before the en banc court.

In considering the necessity for consent, our court recognized that § 636(b) does not authorize referral of prisoner litigation to a magistrate judge for a jury trial. *Id.*; *see Ford v. Estelle*, 740 F.2d 374, 380 (5th Cir. 1984). Accordingly, our court observed that, because § 636(b) was unavailable, § 636(c) was the only means by which the action could be referred. *Id.*

Concerning § 636(c), our court issued the following directive:

> [I]n our circuit, no jury trial of this kind can be conducted by a magistrate [judge] without the consent of all parties, given in writing *and filed before trial commences*. . . . [I]n the exercise of our *supervisory powers*, we direct that before commencing . . . trial in any civil case in which a magistrate [judge] is to preside pursuant to . . . § 636(c), . . . he shall inquire on the record of each party whether he has filed consent to [his] presiding and shall receive an affirmative answer from each on the record before proceeding further.

Id. at 1137 (emphasis added).

At first glance, *Archie's* requiring pre-trial consent appears to control the outcome in the case at hand; here, the consent was post-judgment. This directive, however, is *dictum*. Restated, and as discussed *supra*, our court determined that the error in *Archie* was non-jurisdictional and had been waived; therefore, our court's directive as to when and how consent must be given was not necessary to the holding.

2.

Accordingly, whether, pursuant to § 636(c), post-judgment consent is effective is a question of first impression for our circuit.

Statutory interpretation begins, of course, "with the plain language of the statute". *Moosa v. INS*, 171 F.3d 994, 1008 (5th Cir. 1999). "When the language [of the statute itself] is plain we must abide by it; we may depart from its meaning only to avoid a result so bizarre that Congress could not have intended it." *Id.* (alteration in original; internal quotation marks omitted).

Our court's directive in *Archie*, that consent be pre-trial, adheres to the plain language of § 636(c)(1). The statute reads in part: "*Upon* the consent of the parties, a . . . United States magistrate [judge] . . . *may conduct* any or all proceedings in a [jury or] nonjury civil matter and order the entry of judgment in the case. . . ." 28 U.S.C. §636(c)(1) (emphasis added). The use of "upon" and "may conduct" compels the conclusion that the statute requires consent being given *before* a magistrate judge can act pursuant to § 636(c). The timing of the consent equates with a *condition precedent* to the magistrate judge's acting. In other words, only after the parties give consent is a magistrate judge then vested with jurisdiction to act. Post-judgment consent is contrary to the scheme established by this plain language.

Because the statute's language is plain, and its application does not lead to absurd results, we need not look to its legislative history. In any event, that history supports this construction. When Congress amended § 636 in 1979 to allow magistrate judges, upon consent of the parties and referral by a district judge, to handle dispositive matters, "[t]he Bill clearly require[d] the voluntary consent of the parties as a *prerequisite* to a magistrate [] [judge's] *exercise* of the new jurisdiction". S. REP. NO. 96-74, at 5 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1473 (emphasis added). Consent being a "prerequisite to . . . [the] exercise of . . . jurisdiction" compels the conclusion that it must come before, and not after, the magistrate judge conducts the proceedings and enters final judgment.

A common sense reason for this being required, as reflected in *Archie's* directive, is that, if consent is allowed post-judgment, or even post-trial but pre-judgment, a party can withhold consent, hope its lack is not noticed, and, once the verdict is known: (1) if it is favorable, consent; or (2) if it is not favorable, bring the lack of consent to the attention of either the district court or the appellate court, in which case that party will be entitled to a new trial. Obviously, the potential for such abuse must be removed.

Requiring pre-trial consent does so. The Seventh Circuit in *Shawnee Library* recognized these gamesmanship concerns, but, being bound by its circuit precedent, it stated: "Rather than write a treatise on game theory, however, we simply note that *King* [*v. Ionization, Int'l*, 825 F.2d 1180, 1185 (7th Cir. 1987)] controls". 60 F.3d at 321.

A further reason why we must conclude that the Seventh and Eleventh Circuits' decisions on this issue are contrary to the statute is because their reasoning is foreclosed by our earlier-discussed circuit precedent that consent cannot be implied. The above-referenced *King* is the seminal case holding post-judgment consent effective. The earlier-cited Seventh and Eleventh Circuit decisions, with the exception of *Drake*, all rely on *King*. (Without citing authority, *Drake* held post-appellate-oral-argument consent effective, but its rationale that the post-judgment consents "*indicate* that [the parties] consented to trial by magistrate judge" is consistent with the *King* rationale, discussed below. *See Drake*, 134 F.3d at 883 (emphasis added).)

King reasoned the belated consent is effective because there, the parties' post-judgment statement that the proceedings before the magistrate judge were with their consent was "an unequivocal representation that the magistrate was acting with the parties' consent". 825 F.2d at 1185. Such reasoning, however, necessarily *infers* from the parties' *post-trial statement* that there was *pre-trial consent*. In other words, because the parties, post-judgment, state

the earlier proceedings were with their consent, that must mean the proceedings *occurred* with their consent. Again, this is simply an inference from the parties' post-trial conduct.

But, as stated, our court has held that consent may not be inferred from the parties' actions – in this instance, the post-judgment consent. *See W. La. Health Servs.*, 959 F.2d at 1281. Accordingly, because the *King* reasoning is based upon an inference of consent, it is inconsistent with our court's § 636(c) precedent.

Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system. But, even if we were to adopt the Seventh and Eleventh Circuit's approach, this outcome could not be avoided in all cases. For example, had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment. Under that scenario, we still would be required to remand for a new trial.

III.

For these reasons, consent of all the parties must be given *prior to* a § 636(c) trial commencing. Our en banc court in *Archie*, with the opinion authorized by the late Judge Thomas Gibbs Gee, noted that § 636 "requires the consent of all parties, incorporating explicit provisions safeguarding the *voluntariness* of that consent; and rules, both federal and local, are in place to *insure that no dragooning takes place*". 808 F.2d at 1136 (emphasis added). Certainly, there can be "no dragooning"; likewise, there can be no post-judgment consent.

In her report and recommendation on remand, the magistrate judge noted our court in *Archie* had "attempted to avoid problems such as the one which occurred here by ordering, in the court's supervisory capacity, that before a trial by a magistrate judge commences, the magistrate shall confirm the consent of all parties on the record". *Withrow v. Roell*, No. C-97-256, at 4 n.3 (S.D. Tex.

8 Jan. 2001) (unpublished). To her credit, the magistrate judge sincerely regretted, and apologized for, not having done so. *Id.* at 4 n.4.

Hoping to prevent such mistakes in the future, we repeat our court's en banc directive in *Archie*:

> [I]n our circuit, no jury trial of this kind can be conducted by a magistrate [judge] without the consent of all parties, *given in writing and filed before trial commences*. . . . [I]n the exercise of our *supervisory powers*, we direct that before commencing . . . trial in any civil case in which a magistrate [judge] is to preside pursuant to . . . § 636(c), . . . he shall inquire on the record of each party whether he has filed consent to the magistrate [judges] presiding and shall receive an affirmative answer from each on the record *before proceeding further*.

Id. at 1137 (emphasis added).

For the foregoing reasons, the judgment is VACATED, and this matter is REMANDED for further proceedings, consistent with this opinion, against defendants Joseph C. Roell, Jerry Ballard, Petra Garibay, and Dr. James Reagan.

VACATED AND REMANDED

[Filed November 21, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40627
USDC No. C-97-CV-256

JON MICHAEL WITHROW,

Plaintiff-Appellant,

versus

JOSEPH C. ROELL; JERRY BALLARD;
PETRA GARIBAY; D. KNUTSON, R.N.;
J. REAGAN, M.D.; JOHN DOE, #1;
JOHN DOE, #2; JOHN DOE, #3;
Correctional Officer; JANE DOE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BY THE COURT:

Jon Michael Withrow, pro se Texas prisoner # 675379, moves this court for a copy of his trial transcript at government expense. This court must consider, sua sponte if necessary, whether there was effective consent for the magistrate judge to enter a final judgment. See Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Upon written consent of the parties and designation by the district court, 28 U.S.C. § 636(c)(1) authorizes a magistrate judge to conduct "any or all proceedings in a jury or nonjury civil matter"

and to enter final judgment in the case. 28 U.S.C. § 636(c)(1); Archie v. Christian, 808 F.2d 1132, 1135 n.3 (5th Cir. 1987) (en banc); Fed. R. Civ. P. 73. When the magistrate judge enters final judgment in a suit pursuant to 28 U.S.C. § 636(c)(1), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived. EEOC v. West Louisiana Health Servs., Inc., 959 F.2d 1277, 1281-82 & nn.3 and 4 (5th Cir. 1992); see also Mendes Jr. Int'l Co. v. M/V Sokai Maru, 978 F.2d 920, 923-24 (5th Cir. 1992).

Although the record reflects that Withrow and defendant Reagan consented in writing to proceed before the magistrate judge, the record does not contain written consent forms signed by any other defendant. Accordingly, IT IS ORDERED that the case is REMANDED for the limited purpose of determining whether all of the parties consented under 28 U.S.C. § 636(c)(1) to proceed before the magistrate judge. On remand, the district court should determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written. To the extent that this court has appellate jurisdiction, we retain jurisdiction of this appeal, including jurisdiction over Withrow's motion for a transcript at government expense, pending the district court's compliance with the limited remand. See, e.g., Wheeler v. City of Columbus, 686 F.2d 1144, 1154 (5th Cir. 1982).

REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL.,	§	
	§	
Defendants.	§	

ORDER ADOPTING FINDINGS OF MAGISTRATE JUDGE

On November 21, 2000, the Fifth Circuit remanded this matter for the limited purpose of determining whether all of the parties consented under 28 U.S.C. § 636(c) to proceed before the Magistrate Judge. On January 9, 2001, the Magistrate Judge filed her Memorandum and Recommendation finding that express consent from Defendants Roell and Garibay was not received before trial. Defendants Roell and Garibay object contending that they consented before trial. Having reviewed the pleadings on file, this Court adopts as its own the findings and conclusions of the Magistrate Judge. Defendants Roell and Garibay did not expressly consent before trial despite Defendants' contention that lack of action actually constitutes action. Defendants Roell and Garibay filed express consent on December 7, 2000 -- after the April 27, 1999, selection of the jury and May 16, 2000, rendering of final judgment. However, belated consent is insufficient to cure the jurisdictional defect. *Hajek v. Burlington Northern R.R. Co.*, 186 F.3d 1105, 1108 (9th Cir. 1999).

ORDERED this 1st day of March, 2001.

/s/ H. W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW §

V. § C. A. NO. C-97-256

JOSEPH C. ROELL, ET AL. §

MEMORANDUM AND RECOMMENDATION

On November 21, 2000, the United States Court of Appeals for the Fifth Circuit remanded this case to the District Court for the limited purpose of determining whether all defendants consented to trial before a magistrate judge (D.E. 213). 28 U.S.C. § 636. Defendants Reagan, Roell, and Garibay also moved the court to find that the defendants consented to the jurisdiction of a United States Magistrate Judge (D.E. 216). Both matters were referred to undersigned United States Magistrate Judge for report and recommendation. A review of the record clearly reflects that the express and written consent of defendants Roell and Garibay was not received until December 7, 2000 (D.E. 215).

BACKGROUND

Plaintiff, proceeding *pro se*, filed this lawsuit pursuant to 42 U.S.C. § 1983, alleging that prison officials were deliberately indifferent to his serious medical needs when he fell from his bunk and broke his ankle. After an evidentiary hearing was conducted (D.E. 17), plaintiff filed a written consent to proceed before a United States Magistrate Judge (D.E. 28). The case was reassigned to a United States Magistrate Judge for purposes of conducting all further proceedings, including entry of final judgment (D.E. 30). Citing Neals v. Norwood, 59 F.3d 530 (5th Cir. 1995), the District Court ordered that defendants joined in the case be given an

opportunity to consent to the jurisdiction of the magistrate judge (D.E.30).

On January 12, 1998 (D.E. 34), June 15, 1998 (D.E. 47), July 16, 1998 (D.E. 53), August 12, 1998 (D.E. 61), September 11, 1998 (D.E. 68), November 11, 1998 (D.E. 76), February 23, 1999 (D.E. 113), service of process was ordered as to various defendants. In each order for service of process defendants were directed to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. Defendant Reagan filed his answer July 27, 1998 (D.E. 58), defendant Roell on August 21, 1998 (D.E. 63), defendant Garibay on October 7, 1998 (D.E. 72), and defendant Knutson on April 23, 1999 (D.E. 140), June 10, 1999 (D.E. 144), and June 24, 1999 (D.E. 148).

Of the four defendants joined and served, only defendant Reagan complied with the order for service of process by executing a written consent form (D.E. 65). A review of recorded hearings held April 27, 1999 (D.E. 141), July 21, 1999 (D.E. 151), November 17, 1999 (D.E. 157), January 4, 2000 (D.E. 159), April 26, 2000 (D.E. 185) and April 27, 2000 (D.E. 188), reveals that express oral consent was never sought or given by defendants Garibay and Roell. During the hearing held on April 27, 1999, the issue of whether defendant Knutsen intended to consent to a magistrate was discussed,[1] but there was no mention of consent by defendants Garibay and Roell.[2] The case was scheduled for jury trial before a magistrate judge without objection from either defendant Garibay or Roell, but again the issue of consent was not discussed during the scheduling conference. At the time of jury

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[1] Knutsen did not consent orally or in writing. Plaintiff settled with defendant Knutsen, and voluntarily withdrew his claims (D.E. 152).

[2] The court wrongly assumed that defendants Garibay and Roell had already executed consent forms.

selection, the court announced to the petit panel that the parties had consented to a trial before a United States Magistrate Judge (4/27/00, Tape 1/1750-75). While no party objected to this statement of jurisdiction, express consent was neither requested nor received.

On April 27, 1999, a jury was selected and trial commenced thereafter (D.E. 188). The jury returned a verdict in favor of defendants Garibay, Roell, and Reagan (D.E. 201). Final judgment was entered by undersigned United States Magistrate Judge May 16, 2000 (D.E. 203).

APPLICABLE LAW

A magistrate judge may conduct a jury trial and enter judgment if all parties consent to such jurisdiction and the District Court makes the appropriate reference. 28 U.S.C. 636(c)(1); Mendes Jr. Int'l Co. v. M/V Sokai Maru, 978 F.2d 920, 922-23 (5th Cir. 1992). If a magistrate judge enters judgment, absence of appropriate consent and a reference order results in lack of jurisdiction. Id.; Hill v. City of Seven Points, 230 F.3d 167, 168 (5th Cir. 2000). In this circuit consent cannot be implied by the conduct of the parties, EEOC v. West Louisiana Health Services, Inc., 959 F.2d 1277, 1281 (5th Cir. 1992) (citing Archie v. Christian, 808 F.2d 1132, 1137 (5th Cir. 1987) (en banc)), and the jurisdictional defect cannot be waived. Id. at 1282 (citing McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853, 857 (5th cir. 1991)).

The Seventh Circuit has held that unequivocal consent filed by the parties after the entry of judgment cures the jurisdictional defect, American Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381, 1385 (7th Cir. 1995) (citing King v. Ionization Intern., Inc. 825 F.2d 1180, 1185 (5th Cir. 1987)), but this approach has been rejected by the Ninth and Eleventh Circuits. See Hajek v. Burlington Northern R.R. Co., 186 F.3d 1105, 1108 (9th Cir. 1999); Rembert v. Apfel, 213 F.3d 1331, 1335 (11th Cir. 2000).

Here, the record clearly reflects that defendants Roell and Garibay did not consent orally or in writing.[3] Although by their actions they clearly implied their consent to the jurisdiction of a magistrate, implied consent does not confer jurisdiction. The issue of whether the December 7, 2000, filing of a belated consent form cures this defect has not been addressed by the Fifth Circuit. But if circuit law does not permit implied consent, then belated consent seems even less consistent with the limited statutory grant of consent jurisdiction set forth in 28 U.S.C. §636.[4]

RECOMMENDATION

It is recommended that the District Court report to the Fifth Circuit Court of Appeals that the record does not support a finding of express oral or written consent by defendants Roell and Garibay prior to December 7, 2000. Defendant's motion to find consent (D.E. 216) should be denied.

Respectfully submitted 8 day of January, 2001.

/s/ B. Janice Ellington
B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

---

[3] The Fifth Circuit attempted to avoid problems such as the one which occurred here by ordering, in the court's supervisory capacity, that before a trial by a magistrate judge commences, the magistrate shall confirm the consent of all parties on the record. Archie v. Christian, 808 F.2d at 1137.

[4] Frankly, undersigned is disturbed that she would make a careless mistake which caused inconvenience and expense to the parties, the court, and the jurors. The District Judge could not have known of the problem because it occurred after the case was reassigned. The court apologizes to all persons affected by the error.

[Filed December 15, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
v.	§	CIVIL ACTION NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL	§	

CONSENT TO PROCEED BEFORE A MAGISTRATE JUDGE

Under 28 U.S.C. Sec 636(c), the parties to this civil matter waive their right to proceed before a District Judge and consent to have a United States Magistrate Judge conduct all further proceedings, including the trial and judgment. The U. S. Magistrate Judge has the authority to conduct trials by jury, and the parties understand that they are not waiving their rights to a trial by jury by this consent to proceed before the U.S. Magistrate Judge. Appeal shall be to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. 636(c)(3).

/s/ Jon Michael Withrow _____

Jon Michael Withrow _____

Plaintiff, Pro Se _____

ORDER OF REFERENCE

It is ordered that this matter is assigned to a United States Magistrate Judge to Conduct all further proceedings, including final judgment.

_____ _____

Date U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
v.	§	C. A. NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL.	§	

ORDER OF REFERENCE

Consistent with the plaintiff's consent to proceed to trial before a magistrate judge (D.E. 28), the court assigns this case to United States Magistrate Judge B. Janice Ellington for all further proceedings and entry of judgment in accordance with 28 U.S.C. 636(c); Neals v. Norwood, 59 F.3d 530 (5th Cir. 1995). Any appeal will proceed directly to the United States Court of Appeals for the Fifth Circuit.

In the event defendants are joined and service of process is ordered, all defendants will be given an opportunity to consent to the jurisdiction of the magistrate judge. If all defendants do not consent, this order of reference will be vacated, and the case will be returned to the docket of this judge for final disposition. Id.

ORDERED this 29 day of Dec, 1997.

/s/ H.W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

[Filed December 7, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW, *Plaintiff*,	§	
v.	§	Civil Action No. C-97-256
JOSEPH C. ROELL, ET Al., *Defendants*.	§	

DEFENDANTS ROELL, GARIBAY, AND REAGAN'S CONSENT TO PROCEED BEFORE UNITED STATES MAGISTRATE JUDGE

In accordance with the terms of 28 U.S.C. §636(c) and its provisions for the placement of cases such as the immediate one on an expedited docket before a United States Magistrate Judge, Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

MICHAEL T. McCAUL
Deputy Attorney General for
Criminal Justice

PHILLIP E. MARRUS
Assistant Attorney General
Chief, Law Enforcement Defense
Division

/s/ Charles K. Eldred
CHARLES K. ELDRED
Assistant Attorney General
Attorney-In-Charge
State Bar No. 00793681
Southern District No. 20772

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 495-9139

ATTORNEYS FOR DEFENDANTS
ROELL, GARIBAY, AND REAGAN

CERTIFICATE OF SERVICE

I, Charles K. Eldred, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of **Defendant Roell, Garibay, and Reagan's Consent to Proceed Before United States Magistrate Judge** has been served by placing same in the U.S. Mail on December 5, 2000, addressed as follows:

Jon Michael Withrow
TDCJ No. 675379
Coffield Unit
Route 1, Box 150
Tennessee Colony, Texas 75884

/s/ Charles K. Eldred
CHARLES K. ELDRED
Assistant Attorney General

[Excerpt from Order Denying Defendants' Motion for Summary Judgment]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
v.	§	C. A. NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL.	§	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff is a prisoner in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID") and is currently incarcerated at the Connally Unit in Kenedy, Texas. Proceeding *pro se* and *in forma pauperis*, plaintiff filed his original civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that defendants Joseph Roell, Petra Garibay, and James Reagan, medical personnel at the Garza West/East Unit, were deliberately indifferent to his medical needs, thereby violating his Eighth Amendment right to be free from cruel and unusual punishment (D.E. 1).[5] Defendants now move for summary judgment (D.E.

[5] Service of process on defendant Danny Knutson has not yet been accomplished. Plaintiff's due process, conspiracy, and failure to train and supervise claims against all defendants and plaintiff's claims against defendant Ballard and Jane Doe were dismissed by order entered January 14, 1998 (D.E. 33). John and Jane Doe defendants were dismissed by order entered July 20, 1998 (D.E. 56).

78). Plaintiff has filed a response in opposition to the motion for summary judgment (D.E. 93, 94, 95, 96, 97).

By order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. § 636(c)(1) (D.E. 30). For the reasons stated herein, the Court denies defendants' motion for summary judgment.

. . . .

ORDERED this 2 day of March, 1999.

/s/ B. Janice Ellington
B. JANICE ELLINGTON
UNITED STATES MAGISTRATE
JUDGE

[Excerpt from April 27, 2000 trial transcript, p. 37]

THE COURT: Thank you. You may be seated. Good morning, members of the panel. As you just heard, my name is Janice Ellington and I'm a United States Magistrate Judge. Ordinarily Magistrate Judges are appointed judges and we serve as adjuncts to the federal district court judges. In this case -- or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW §

v. § C. A. NO. C-97-256

JOSEPH C. ROELL, ET AL. §

FINAL JUDGMENT

Final judgment based on the jury's verdict that plaintiff take nothing from defendants Petra Garibay, James Reagan and Joseph Roell is entered. Final Judgment dismissing defendants Ballard, Knutsen, Gariloy, and all John and Jane Does is entered.

ORDERED this 15 day of May, 2000.

/s/ B. Janice Ellington
B. JANICE ELLINGTON
UNITED STATES MAGISTRATE
JUDGE

Supreme Court U.S.
FILED
SEP 13 2002
OFFICE OF THE CLERK

No. 02-69

IN THE SUPREME COURT
OF THE UNITED STATES

Joseph C. Roell, Petra Garibay, and James Reagan,

Petitioners,

v.

Jon Michael Withrow,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, John Michael Withrow, asks leave to file the accompanying Brief in Opposition and to proceed *in forma pauperis*. Respondent was granted leave to so proceed in both the U.S. District Court for the Southern District of Texas and the U.S. Court of Appeals for the Fifth Circuit in this action. On Saturday, September 7, 2002, respondent mailed an *in forma pauperis* declaration to undersigned counsel, but it has yet to be received. The declaration establishes the above statements and that respondent is unable to afford the cost of printing this brief. Respondent's declaration will be filed as soon as it is received.

Respectfully submitted,

Brian Wolfman

Brian Wolfman
(Counsel of Record)
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

September 13, 2002

Counsel for Respondent

49pp

No. 02-69

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH C. ROELL, etal — PETITIONER
(~~Your Name~~)

VS.

JON MICHAEL WITHROW RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The ~~petitioner~~ Respondent asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[✓] ~~Petitioner~~ Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s): TEXAS STATE COURTS
Brazoria County; 14th Court of Appeals; 1st Court of Appeals; Supreme Court
FED. COURTS: Southern & Eastern Districts; 5th Circuit; Supreme Court

[ ] ~~Petitioner~~ Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

~~Petitioner~~ Respondent's ~~affidavit or~~ declaration in support of this motion is attached hereto.

Jon Michael Withrow
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jon Michael Withrow, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$ 100.00	$	$ 100.00	$
Alimony	$	$	$	$
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify): _____	$	$	$	$
Total monthly income:	$ 100.00	$	$ 100.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
MCT (Gene Britton)	savings trust fund	$ 7.00	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☑ Home
Value $9,000.00

☐ Other real estate
Value

☑ Motor Vehicle #1
Year, make & model 95 Toyota truck
Value $200.00
non-operable

☑ Motor Vehicle #2
Year, make & model 95 Yamaha motorcycle
Value $200.00
non-operable

☐ Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$ 100.00	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other: _____	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other: _____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify): _____	$	$
Total monthly expenses:	$ 100.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am a Texas State Prisoner and I am not allowed to earn or handle any type of money.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Sept 29, 2002

Jon Michael Whitmore
(Signature)

No. 02-69

IN THE SUPREME COURT
OF THE UNITED STATES

Joseph C. Roell, Petra Garibay, and James Reagan,

Petitioners,

v.

Jon Michael Withrow,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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September 13, 2002

QUESTIONS PRESENTED

1. Was the court of appeals correct in vacating a final judgment entered by the Magistrate Judge on the ground that two defendants did not consent to the referral to the Magistrate Judge prior to issuance of the final judgment, as required by both the Federal Magistrates Act, 28 U.S.C. § 636(c), and the local rules of the district court?

2. If not, is the Federal Magistrates Act unconstitutional insofar as it purports to authorize non-Article III judges to preside at trial and enter final judgments in federal district court proceedings?

Perez-Priego v. Alachua County Clerk of Court,
148 F.3d 1272 (11th Cir. 1998) 20

Rembert v. Apfel,
213 F.3d 1331, 1335 (11th Cir. 2000) 20

STATUTES

28 U.S.C. § 636 1

28 U.S.C. § 636(b)(1) 1

28 U.S.C. § 636(c) ..... *passim*

28 U.S.C. § 1291 ..... 21, 22

42 U.S.C. § 1983 1

RULES

Fed. R. Civ. P. 73(b) 2, 13, 14

Advisory Committee Note to Fed. R. Civ. P. 73(b) 14

Fed. R. Civ. P. 83(a)(1) 13

Fed. R. Civ. P., Appendix of Forms, Form 34 2

Rule 73.2(c) of the Local Rules for the Northern District of Alabama 16

Chapter V, Rule 6.6.3 of the Local Rules of the United States District Court for the Central District of California 16

Local Rule 72.2(D) of the Local Rules of Practice of the United States District Court for the District of Colorado 16

Rule 4(c)(3) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts 16

Local Rule 73.1(c) of the Local Rules of the United States District Court for

the Eastern District of Michigan 16

Rule 73.1(c) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi 16

Rule 73.1 of the Local Rules for the Western District of Missouri 16

Local Civil Rule 73.1(b) of the United States District Court for the Southern and Eastern District of New York 16

Local Rule 72.1.III(b)(2) of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania 16

Appendix B, Rule I(1)(a) of the Local Rules of the United States District Court for the Eastern District of Texas 16

General Order No. 80-5 of the United States District Court for the Southern District of Texas 3, 14

Appendix C, Rule 3(b)(3) of the Local Rules of the United States District Court for the Western District of Texas 16

LEGISLATIVE HISTORY

S. Conf. Rep. No. 96-322 (1979) 13

S. Rep. No. 96-74 (1979) 17

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jon Michael Withrow, a Texas prison inmate, filed a *pro se* suit under 42 U.S.C. § 1983 against prison doctors and nurses regarding constitutionally inadequate medical care. Withrow consented in writing to referral of his case to a magistrate judge for trial and entry of final judgment. However, two of the four defendants never consented, either orally or in writing. A magistrate judge nonetheless presided at trial and entered final judgment in favor of all defendants. On appeal, the Fifth Circuit *sua sponte* questioned whether the two defendants had consented to the referral to the magistrate judge and remanded the case for that determination. After the lower court held that the two defendants had not consented to the referral, the Fifth Circuit vacated the Magistrate Judge's decision and remanded the case for trial before the district court. As shown below, that ruling was correct and does not present issues of importance meriting review by this Court.

STATEMENT OF THE CASE

1. Statutory and Procedural Background

The Federal Magistrates Act, 28 U.S.C. § 636, permits federal district courts to refer certain non-dispositive matters to federal magistrate judges. *Id.* § 636(b)(1). In addition, the Act states that, "upon the consent of the parties," magistrate judges may preside over trials and enter final judgments. 28 U.S.C. § 636(c). In those cases, magistrate judges assume the role of an Article III judge: They issue final judgments that

are not reviewed or approved by a federal district judge and that can only be appealed to a United States Court of Appeals. Section 636(c) provides:

> (1) Upon the consent of the parties, a full-time United States magistrate or part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.
>
> * * *
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

The mechanism for providing the consent required by section 636(c) is addressed by Federal Rule of Civil Procedure 73(b), which provides:

> Consent. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

The Federal Rules of Civil Procedure also provide a sample form on which the parties express their consent to the exercise of jurisdiction by a United States Magistrate Judge. Fed. R. Civ. P. Appendix of Forms, Form 34.

Like many federal district courts, the United States District Court for the Southern District of Texas has established detailed procedures governing the referral of cases to magistrate judges. At the time that Withrow's case was filed, the procedures for referral to magistrate judges in the Southern District of Texas were governed by General Order No. 80-5.[1] Article III(B) of that order instructed the clerk of the court to notify the parties that they may consent to have a magistrate "conduct any or all proceedings in the case and order the entry of a final judgment." General Order No. 80-5, Art. III § B(1), Resp. App. 7A. That notice was mailed to the plaintiff at the time the action was filed and to the other parties as attachments to copies of the summons and complaint. The General Order provided that a case may only be referred to a magistrate judge if consent is first provided in writing by all the parties. In relevant part, the Order stated:

> 2. Execution of Consent.
>
> The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any district judge or magistrate, unless all parties have consented to the reference to a magistrate. No district judge, magistrate, or other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a district judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.
>
> 3. Reference
>
> *After the consent form has been executed and filed*, the clerk shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate. *Once the case has been assigned to a magistrate*, the magistrate shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the clerk of the court to enter a final judgment in the same manner as if a district judge had presided.

Id. (emphasis added).

[1] General Order 80-5 has been replaced by General Order 2001-6, which is substantially similar and also requires that the parties all give consent prior to referral to a magistrate judge.

2. Factual Background

In May of 1995, Withrow fell from his prison bunk and broke his ankle. Withrow was taken to the prison infirmary, where he was given pain medication and an ace bandage. He was returned to the prison population, where he was forced to walk around the prison for food, clothing, and other necessities. Prison doctors did not order x-rays, which confirmed that he had broken his ankle, until three days after his accident.. By the time Withrow was admitted to the hospital, six days after the accident, he was suffering from severe swelling and fracture blisters, which complicated the surgery he needed to repair his ankle and caused him to suffer unnecessary pain. Complaint ¶¶ 17-124 (Docket Entry ("D.E.") 1).

On April 30, 1997, Withrow filed this *pro se* lawsuit charging that Joseph Roell and James Reagan, prison physicians, and Petra Garibay and Danny Knutson, prison nurses, were deliberately indifferent to his medical needs in violation of his Eighth Amendment rights. United States District Judge Hayden Head was assigned the case.

On December 15, 1997, prior to service on defendants, Withrow filed a written consent to have the case referred to a United States Magistrate Judge for trial and entry of final judgment. The district court did not await the consent of defendants as the local rules require. Rather, on December 29, 1997, the court referred the case to Magistrate Judge B. Janice Ellington. Pet. App. 16a-17a. In his Order, Judge Head noted that only plaintiff had consented, and he stated that "all defendants will be given an opportunity to consent to the jurisdiction of the magistrate judge. If all defendants do not consent, this order of reference will be vacated, and the case will be returned to the docket of this judge for final disposition." Pet. App. 21a.

On January 14, 1998, Magistrate Judge Ellington ordered the clerk to issue to defendants Judge Hayden's December 29, 1997 Order along with a summons and a copy of the complaint. Defendants were directed to respond to the complaint and in their response to "include a statement that 'All defendants consent to the jurisdiction of a United States Magistrate Judge' or 'All defendants do not consent to the jurisdiction of a United States Magistrate Judge.'" Order for Service of Process (D.E. 34). Defendant Reagan responded that he consented to referral; the rest of the defendants did not indicate whether or not they consented.[2] Pet. App. 17a.

The issue of consent to the referral also came up at several pre-trial hearings. At an evidentiary hearing on September 9, 1997, an attorney representing the Attorney

[2] Knutson settled and was dismissed from the suit on October 20, 1999.

General of Texas attended, but withheld consent, explaining that she could not do so before conferring with the attorney that would be assigned to the case. Hearing 9/9/1997 (D.E. 17). During a telephone hearing on April 27, 1999, the Magistrate Judge reminded counsel for defendants that "all defendants need to consent before I can hear a case," but the parties did not consent orally or provide written consent. Hearing 4/28/1999 (D.E. 141). Again, on July 21, 1999, the issue of consent was raised, but counsel for defendants Roell and Garibay did not expressly consent to the referral. Hearing 7/21/1999 (D.E. 219).

The trial went forward before a jury. During jury selection, the Magistrate Judge announced that the parties had consented to a trial before a United States Magistrate Judge. Pet. App. 27a. Roell and Garibay neither objected to this statement nor used the occasion to consent to the reference. Pet. App. 18a. After a three-day trial, the jury returned a verdict for defendants. Magistrate Judge Ellington issued final judgment in favor of defendants on May 15, 2000. Withrow then filed a timely notice of appeal.

On November 21, 2000, before any briefs were filed, the Fifth Circuit *sua sponte* remanded the case to the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." App. 13a. The Fifth Circuit retained jurisdiction pending district court compliance with the remand. *Id.*

On remand, defendants Roell and Garibay for the first time filed a written consent, in which they stated that "they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." Pet. App. 22a.

The district court referred the issue to Magistrate Judge Ellington for a report and recommendation. Magistrate Judge Ellington noted that all defendants had been directed to file a statement as to whether they consented to the jurisdiction of a magistrate judge at the time they received service of process, but that only defendant Reagan had complied with that order. Pet. App. 17a. Nor had defendants Roell and Garibay given oral consent to the reference in the six hearings that preceded the trial. Pet. App. 17a. The Magistrate Judge concluded that defendants Garibay and Roell had implicitly consented to her jurisdiction but had not expressly consented until after the jury issued its decision and therefore that the case would have to be retried. Pet. App. 19a. The district court adopted the report and recommendation over defendants' objections and the case returned to the Fifth Circuit. Pet. App. 14a.

In his appellate brief, Withrow argued that the Magistrates Act requires pre-judgment consent, and thus Magistrate Judge Ellington had no authority to enter a final judgment and the Fifth Circuit had no authority to review that final judgment. Withrow also expressed his concern that petitioners had engaged in gamesmanship, noting that although the issue of whether the parties had consented was raised on numerous

occasions, petitioners' counsel had carefully avoided either granting or withholding consent on behalf of his clients. Withrow's Appellate Brief at 5-7. Withrow argued that "the Defendants delayed consenting so that if they lost at trial a claim of lack of jurisdiction could be raised." *Id.* at 5.

Petitioners acknowledged that whether the parties consented to the Magistrate Judge is a jurisdictional question subject to *de novo* review. Petitioners' Appellate Brief at 2. According to petitioners, "[a]lthough no written or oral consent to trial by [the] Magistrate appears in the record prior to the time of trial, Roell and Garibay did consent to the Magistrate's jurisdiction, as demonstrated by the actions of the lower court and all parties." *Id.* at 1. Petitioners noted that the Magistrate Judge had discussed the need for all parties to consent at several hearings, and on a few occasions appeared to believe that petitioners had already consented, but petitioners admitted that they had never given explicit consent. *Id.* at 1-3. Petitioners urged the Fifth Circuit to join the Seventh and Eleventh Circuits in concluding that "'belated' consent cures jurisdictional defects." *Id.* at 4.

The Fifth Circuit held that defendants had not consented to the referral prior to the trial, as required by the Magistrates Act. The court rejected Roell and Garibay's argument that their post-judgment consent was sufficient, noting that the plain language of the Act makes consent a "condition precedent" to the magistrate judge's exercise of jurisdiction and that the legislative history supports this interpretation. Pet. App. 8a. The

court commented that the rule urged by petitioners would lead to gamesmanship: Parties would be tempted to withhold consent, await the outcome of trial, and then consent only if they prevailed. In this very case, the court noted, "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." Pet. App. 10a. In addition, the Fifth Circuit explained that permitting post-judgment consent requires inferring from a party's post-judgment statement that they had given pre-judgment consent, which contradicts Fifth Circuit precedent that consent must be explicit, not inferred from the parties' actions. Pet. App. 9a-10a. Finding that defendants' lack of consent was a jurisdictional error that could not be waived, the Fifth Circuit remanded the case for retrial. Pet. App. 10a.

REASONS FOR DENYING THE WRIT

Petitioners seek review by this Court of the question whether the Magistrates Act permits post-judgment consent to referral to a magistrate judge. That question is not clearly presented in this case, however, for several reasons. First, essential to petitioners' argument is their claim that their written post-judgment consent simply "confirmed" the implied consent evident from their pre-judgment conduct. However, petitioners failed to consent prior to judgment, either in writing or orally, despite repeatedly being informed by the court that they must do so — behavior that suggests that petitioners were withholding consent, not granting it, undermining petitioners' claim of implied consent. Thus, the key factual predicate for the question presented, as framed by petitioners, is

missing. Second, petitioners overlook the fact that the local rules in the Southern District of Texas *require* pre-judgment consent, which provides an alternative basis for the Fifth Circuit's holding. Moreover, the question whether the Federal Magistrates Act permits post-judgment consent is not significant because many district courts have rules requiring pre-judgment consent, which are indisputably permitted by the Act. In any event, the Fifth Circuit's conclusion that the Act requires consent prior to judgment is correct. Finally, the court's holding that failure to consent is an unwaivable jurisdictional error is both correct and in line with decisions of every circuit court to have addressed this issue.

I. THE FACTS OF THIS CASE PREVENT THIS COURT FROM ADDRESSING THE QUESTION WHETHER THE MAGISTRATES ACT REQUIRES PRE-JUDGMENT CONSENT.

The petition glosses over facts that prevent this Court from addressing the question presented. Petitioners contend that their post-judgment consent merely confirmed their implicit pre-judgment consent, a point that is essential to their argument that the Magistrates Act permits explicit post-judgment ratification of implicit pre-judgment consent. Indeed, Petitioners' question presented asks whether they can their failure to consent by expressly "confirming" their consent post-judgment. Pet. i. Yet, as Withrow argued before the Fifth Circuit, the record reveals that petitioners studiously did *not* consent to the jurisdiction of the magistrate prior to the entry of judgment in their favor, implicitly or otherwise, despite prompting by the Magistrate Judge on numerous occasions, which suggests that they were withholding consent, not granting it.

Petitioners "agree that a magistrate judge cannot act under § 636(c) without the parties' consent," Pet. 15, but argue that the consent need not be made explicitly before judgment as long as the parties' pre-judgment conduct indicates their consent. Petitioners assert:

> Congress' concerns about voluntariness are satisfied in this case by all parties' express consent -- whether pre-trial or post-judgment -- *coupled with indicia of consent from their litigating this case in a manner consistent with consensual referral.*

Pet. 18 (emphasis added). According to petitioners, their post-judgment consent was entirely consistent with their pre-judgment conduct and simply "confirmed" their pre-judgment "indicia of consent." Pet. 1 (describing their written consent as a "post-judgment *confirmation* of consent") (emphasis added); Pet. 6, 14, 15 (same). And in their post-judgment statement submitted to the district court on remand, petitioners declared that they had, in fact, consented all along to the Magistrate Judge's jurisdiction:

> Defendants Roell, Garibay and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Cristi Division for all purposes, including entry of judgment and jury trial. *Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial.*

Pet. App. 22a (emphasis added).

Petitioners' post-hoc assertions that they had consented all along are at odds with their pre-judgment conduct. Petitioners did not submit the consent forms attached to service of process and did not consent, even orally, at the two hearings where this issue

was raised by the Magistrate Judge. *See supra* at 5-6 . Their failure to take advantage of these numerous opportunities to give explicit consent implies an intention to *withhold* consent, not to grant it. On the particular facts here, it cannot be shown (and it is certainly not undisputed) that the parties' conduct was consistent with consent, a point essential to petitioners' claim that the Magistrates Act permits post-judgment consent when that consent "confirms" pre-judgment "indicia of consent." Pet. 18. Thus, this Court has no basis for reaching the question presented.

II. THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS, WHICH REQUIRE THAT ALL THE PARTIES PROVIDE PRE-JUDGMENT CONSENT TO A REFERRAL TO A MAGISTRATE JUDGE, PROVIDE AN ALTERNATIVE BASIS FOR THE FIFTH CIRCUIT'S HOLDING, AND THE EXISTENCE OF SIMILAR LOCAL RULES IN OTHER JURISDICTIONS DIMINISHES THE IMPORTANCE OF THE QUESTION PRESENTED.

A. This case does not squarely present the question of when parties must consent to referral to a magistrate judge under the Magistrates Act because the local rules in the Southern District of Texas provide an alternative ground for sustaining the Fifth Circuit's decision.

Petitioners argue that Congress, in enacting the Magistrates Act, "insisted only that consent be voluntary, not that parties manifest consent in a particular manner." Pet. 6. Even if that statement were correct, the local rules of the Southern District of Texas mandate that parties provide written consent *before* a case can be heard and decided by a magistrate. Accordingly, the result in this case does not turn solely on the requirements of the Magistrates Act.

District courts are free to enact local rules of procedure as long as those rules are "consistent with" federal statutes and the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83(a)(1). Even if the Magistrates Act does not require express pre-judgment consent, as we believe it does, it certainly does not bar district courts from establishing local rules mandating pre-judgment consent. To the contrary, requiring pre-judgment consent promotes the Act's goal of protecting the "voluntariness, knowingness, and willingness of the consent" to referral, *see* S. Conf. Rep. No. 96-322, at 7-8 (1979), which is presumably why the Southern District of Texas has adopted such a rule.

Moreover, both the Magistrates Act and Federal Rule of Civil Procedure 73(b) expressly contemplate that district courts will establish procedural rules governing the use of magistrates, including the timing of consent to referrals. Section 636(c)(2) of the Act states: "*Rules of court* for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." (emphasis added). Federal Rule of Civil Procedure 73(b), in turn, confirms that local rules govern the time period within which the parties must express their consent to the referral: "If, *within the period specified by local rule*, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election." (emphasis added). The advisory committee notes explain that "flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within

which an election must be made." Advisory Committee Note to Fed. R. Civ. P. 73(b). Thus, even if 28 U.S.C. § 636(c) does not require explicit, pre-judgment consent, the Magistrates Act grants the Southern District of Texas the authority to impose a reasonable deadline by which the parties must consent.

And it has done so. The local rules of the Southern District of Texas require that parties consent prior to the magistrate's exercise of jurisdiction. As explained above, *see supra* 3-4, General Order 80-5 states that it is only "*[a]fter the consent form has been executed and filed,*" that the clerk "shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate." Resp. App. 1a (emphasis added). Thus, in the Southern District of Texas the consent form must *first* be executed by all parties, and only thereafter can the case be referred to a magistrate.

Petitioners did not follow the local rules' mandate that they provide written consent prior to referral. Although petitioners received the requisite notice and form regarding referral to the Magistrate Judge as part of service of process, they failed to fill out and return that form. And although the Magistrate Judge mentioned during several hearings that the parties must consent to the referral, petitioners never did so. *See supra* at 5-6. In short, despite multiple opportunities, petitioners did not comply with the district court's rules regarding referrals to magistrate judges.

Petitioners' violation of the local requirements is an alternative ground for concluding that the Magistrate Judge lacked jurisdiction to preside over this case, and

thus the outcome of this case does not turn on the question presented for this Court's review. Although the question whether the local rules mandate pre-judgment consent was not raised before the Fifth Circuit, it is preserved in the record below. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (respondent "may rely upon any matter appearing in the record in support of the judgment below."). If this Court grants the petition for writ of certiorari, respondent will raise the local rules as an alternative basis for the ruling below, which, in our view, makes it likely that the Court will not reach the question whether the Magistrates Act requires express, pre-judgment consent.[3]

B. The fact that local rules govern the timing of consent also diminishes the significance of the question presented. In the 23 years that the Magistrates Act has been in effect, only four circuits have taken a position on the question whether 28 U.S.C. § 636(c) tolerates post-judgment consent. The likely reason for the dearth of case law is that the situation here rarely arises. Most district courts have rules requiring explicit, pre-judgment consent, and most magistrates therefore take care to require that each party has

[3] The conclusion that local courts can set rules requiring pre-judgment consent is not in conflict with the Seventh and Eleventh Circuit decisions permitting post-judgment consent. Petitioners are correct that those courts have held that the Magistrates Act *permits* post-judgment consent, but they have not held that the Magistrates Act *requires* courts to accept post-judgment consent. *See, e.g., Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987); *General Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (11th Cir. 1997). For example, in *King*, the Seventh Circuit concluded that the Magistrates Act "does not require a specific form or time of consent," which suggests that the Seventh Circuit believed that the Act allows each court to set its own rules. *Id.* at 1185. In sum, the precedents of the Seventh and Eleventh Circuits do not bar individual district courts, or circuit courts for that matter, from establishing procedures prohibiting post-judgment consent.

expressed consent *prior* to presiding over a jury trial or issuing a final judgment.[4] Because it is so rare that the ultimate winner at trial failed to consent to the referral, the question whether the Magistrates Act actually permits the winner to consent after the fact rarely arises. In short, to the degree that there is a split of authority in the abstract, as a practical matter the majority of district courts have set local rules that prevent the conflict from arising.

[4] *See, e.g.*, Rule 73.2(c) of the Local Rules of the United States District Court for Northern District of Alabama (if all parties consent within 90 days after a civil case is filed, their consents will be docketed and the case will be reassigned to a magistrate judge); Ch. V, Rule 6.6.3 of the Local Rules of the United States District Court for the Central District of California (parties' written consents must be filed before magistrate judge has authority to conduct proceedings; consent must be filed "at least thirty (30) days prior to date of the Final Pre-trial Conference" unless district court approves later consent); Local Rule 72.2(D) of the Local Rules of Practice of the United States District Court for the District of Colorado (written consent to proceed before a magistrate judge "must be filed no later than ten days after the discovery cut-off date"); Rule 4(c)(3) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts (consent form must be filed with the clerk "within twenty days of the filing of an answer or other responsive pleading by the parties"); Local Rule 73.1(c) of the Local Rules of the United States District Court for the Eastern District of Michigan (consent forms may be entered until 30 days before trial); Rule 73.1(c) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi (requiring that consent be entered "at any time before trial of the case"); Rule 73.1 of the Local Rules for the United States District Court for the Western District of Missouri (clerk shall not accept consent form unless it has been signed by all parties; "[a]fter consent form has been executed and filed" clerk will transmit it to district court judge for referral); Local Civil Rule 73.1(b) of the United States District Court for the Southern and Eastern District of New York (consent forms must be filed before case is assigned to magistrate judge); Local Rule 72.1.III(b)(2) of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania; Appendix B, Rule I(1)(a) of the Local Rules of the United States District Court for the Eastern District of Texas (clerk shall not file consent forms until all parties have consented); Appendix C, Rule 3(b)(3) of the Local Rules of the United States District Court for the Western District of Texas ("[a]fter consent form has been executed and filed" clerk will transmit it to judge for referral to magistrate).

In addition, because so many local district rules require pre-judgment consent, a ruling on whether the Magistrates Act also requires pre-judgment consent would have little effect on the conduct of parties in the lower courts. The parties will normally follow the requirements of the local rules and give pre-judgment consent. In those rare cases where the parties do not follow the local rules, and the magistrate judges fail to insist that they consent before entering a final judgment, the courts need not address the question whether the Magistrates Act itself requires pre-judgment consent if, as is usually the case, the local rules contain the same requirement.

III. THE FIFTH CIRCUIT'S HOLDING IS CORRECT.

The Fifth Circuit's reading of section 636(c) is correct. The statute states: "*Upon the consent* of the parties, a . . . United States magistrate [judge] . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." (emphasis added). The language of section 636(c) makes consent a condition precedent for a magistrate's exercise of jurisdiction. The legislative history supports this conclusion. The Senate Report accompanying the 1979 amendments to the Act, in which Congress granted magistrate judges the authority to handle dispositive matters, explained, "[t]he Bill clearly require[d] the voluntary consent of the parties as a *prerequisite* to a magistrate [] [judge's] *exercise* of the new jurisdiction." S. Rep. No. 96-74, at 5 (1979) (emphasis added). Moreover, pre-judgment consent prevents parties from gaming the

system by withholding consent until they know whether they have won or lost, a strategy that parties would surely adopt if they were permitted to consent post-judgment.

Indeed, petitioners' conduct in this case raises the very concerns about gamesmanship that support the Fifth Circuit's reading of the Magistrates Act. Petitioners did not consent pre-judgment, despite repeated prompting by the magistrate judge, and thus at the time of entry of the final judgment they were free either to consent or object to the referral. Fifth Circuit commented that "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." Pet. App. 10a. To prevent parties from gaming the system, and to ensure that every party has knowingly and voluntarily consented to the magistrate's jurisdiction, the Federal Magistrates Act and the rules of the Southern District of Texas require explicit, pre-judgment consent.

Moreover, any other reading of the Magistrates Act raises serious constitutional questions about the provisions of the Act that permit magistrates to preside over jury trials and enter final judgments. *See Peretz v. United States*, 501 U.S. 923, 929-30 (1991). Article III of the U.S. Constitution provides that all judges assigned the task of deciding questions of federal law must have life tenure and salary protections -- protections that magistrates lack. Thus, the provisions of the Magistrates Act permitting magistrates to enter final judgments, even *with* all the parties' consent, are constitutionally suspect. *See Peretz*, 501 U.S. at 937 (discussing constitutional concerns raised by transfer of jurisdiction to non-Article III tribunals). Indeed, if this Court grants

review, we will argue that the Magistrates Act does not permit magistrates to preside over jury trials and enter final judgments absent every party's pre-judgment consent, as the Fifth Circuit held, and, alternatively, that the provisions of the Magistrates Act permitting non-Article III magistrates to take on such a role are unconstitutional.

IV. PETITIONERS' FAILURE TO CONSENT BEFORE JUDGMENT DEPRIVED THE FIFTH CIRCUIT OF JURISDICTION OVER THIS APPEAL.

Petitioners argue that, even if the Magistrates Act requires pre-judgment consent, failure to consent does not deprive the appellate court of jurisdiction over the final judgment entered by the Magistrate Judge, and thus the issue of consent should not have been raised *sua sponte* by the Fifth Circuit. Petitioners did not make this argument below -- in fact, they admitted that "[w]hether all parties consented to [the] Magistrate is a jurisdictional question," Pet. Appellate Br. at 2 -- and thus it has been waived. However, even if Petitioners had not waived the issue, and even if Petitioners were correct that the issue of consent does not affect the appellate court's jurisdiction, the Fifth Circuit nonetheless had discretion to raise such a fundamental issue *sua sponte*, without waiting for the parties to raise it themselves, and thus the question whether the issue is "jurisdictional" is irrelevant.

In any case, the Fifth Circuit's conclusion that the question of consent is a jurisdictional question that must be raised *sua sponte* is correct, and is in line with the other circuit courts to have addressed the issue. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001); *Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*,

237 F.3d 1001, 1003-04 (9th Cir. 2001); *American Suzuki Motor Corp. v. Bill Kummer*, 65 F.3d 1381, 1385 (7th Cir. 1995). As these courts have explained, the Magistrates Act provides that a party "may appeal directly to the appropriate United States court of appeals" from a magistrate judge's final judgment "in any case referred under paragraph (1) of this subsection." 28 U.S.C. § 636(c). A magistrate judge may only issue a final judgment in a case referred under paragraph (1) "[u]pon consent of the parties." *Id.* Thus, without consent, a magistrate judge has no authority to enter a final judgment and the court of appeals has no power to hear the appeal from the magistrate judge's purported entry of final judgment. If the consent requirement is not met, a magistrate judge's final judgment has status equivalent to a magistrate judge's report and recommendation, which must be adopted by a district court before it can be appealed. *See, e.g., Rembert v. Apfel*, 213 F.3d 1331, 1335 (11th Cir. 2000) ("[W]e are in essence asked to review a nonfinal, nonappealable report and recommendation not yet adopted by the district court. We cannot pass on the merits of this appeal, but must dismiss it for lack of jurisdiction."); *Perez-Priego v. Alachua County Clerk of Court*, 148 F.3d 1272, 1273 (11th Cir. 1998).

Petitioners claim that two Tenth Circuit cases have held that errors in the referral process do not vitiate appellate jurisdiction. *See* Pet. 19 (citing *In re Griego*, 64 F.3d 580 (10th Cir. 1995); *Clark v. Poulton*, 963 F.2d 1361 (10th Cir. 1992)). In both cases, however, the magistrate judges did not attempt to enter a final judgment, but instead

issued a report and recommendation that was ultimately adopted by the district court. The Tenth Circuit held that errors in that referral process did not deprive it of jurisdiction over the final judgment because the judgment had been entered by the *district court*, not by the magistrate. *See In re Griego*, 64 F.3d at 583; *Clark*, 963 F.2d at 1366-67. That is the same conclusion that the *en banc* Fifth Circuit reached in *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987), which held that the errors in the referral process did not deprive the court of jurisdiction to review the final judgment entered by the district court. *Id.* at 1135. In this case, however, the Magistrate Judge herself purported to enter final judgment, from which Withrow appealed. Because the Magistrate Judge had no authority to issue that judgment absent the parties' consent, the Fifth Circuit had no jurisdiction over the appeal.

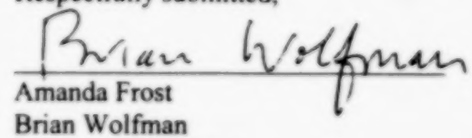
According to petitioners, the Fifth Circuit held that petitioners' failure to consent to the referral deprived it of *subject matter* jurisdiction over Withrow's appeal of the final judgment, which differentiates the Fifth Circuit's decision from those circuit courts that have held they lack *appellate* jurisdiction, 28 U.S.C. § 1291, over a final judgment entered by a magistrate judge without the consent of all the parties. Pet. 18-19 & n.11. Although it is not clear whether the Fifth Circuit's holding was based primarily on lack of Article III subject matter jurisdiction or lack of appellate jurisdiction under section 1291, both are grounds for dismissing the appeal for want of jurisdiction. A federal court can exercise jurisdiction only when it has both constitutional *and* statutory authority to do so.

Because Magistrate Judge Ellington was not properly delegated authority by an Article III judge to issue a final judgment, the Fifth Circuit had no *constitutional* authority to review that judgment. And because the Magistrate Judge lacked authority to enter a final judgment pursuant to the Magistrates Act, the Fifth Circuit lacked *statutory* jurisdiction because there was no final judgment to review, as required by section 1291. Thus, the Fifth Circuit was required to raise the issue *sua sponte* and dismiss the appeal for want of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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September 13, 2002

APPENDIX

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 16 1980
JESSE E. CLARK, CLERK
BY DEPUTY: E. Churchwell

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

IN THE MATTER OF JURISDICTION AND PROCEDURES FOR UNITED STATES MAGISTRATES FOR THE SOUTHERN DISTRICT OF TEXAS	§ § § § § § §	GENERAL ORDER NO. 80-5

ORDER

Pursuant to the Federal Magistrates Act of 1979 and Local Rule 19, it is

ORDERED that the authority of the United States Magistrates for the Southern District of Texas, the assignment of matters to them, the procedures to be followed before the Magistrates, and the review and appeal of magistrate cases shall be in accordance with the provisions set forth in that part of this Order entitled "Practice before United States Magistrates, Southern District of Texas" including the forms attached thereto.

The Clerk will furnish certified copies of this Order to the several divisions of this court and to the Magistrates of this court. Copies will be available in the office of the Clerk.

ORDERED and ADOPTED, this 16th day of June, 1980.

JOHN V. SINGLETON, JR.
Chief Judge

Woodrow Seals
WOODROW SEALS
United States District Judge

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By E. Churchwell
Deputy Clerk

CARL O. BUE, JR.
United States District Judge

OWEN D. COX
United States District Judge

ROBERT O'CONOR, JR.
United States District Judge

ROSS N. STERLING
United States District Judge

GEORGE E. CIRE
United States District Judge

JAMES DE ANDA
United States District Judge

NORMAN W. BLACK
United States District Judge

GEORGE P. KAZEN
United States District Judge

GABRIELLE K. McDONALD
United States District Judge

HUGH GIBSON
United States District Judge

ALLEN B. HANNAY
Senior United States District Judge

PRACTICE BEFORE UNITED STATES MAGISTRATES
SOUTHERN DISTRICT OF TEXAS

ARTICLE I. AUTHORITY OF UNITED STATES MAGISTRATES

A. Duties Under 28 U.S.C. § 636(a).

Each United States magistrate of this court is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may -

1. Exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

2. Administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and

3. Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

B. Disposition of Misdemeanor Cases - 18 U.S.C. § 3401.

A magistrate may -

1. Try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

2. Direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

3. Conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

C. Determination of Non-Dispositive Pretrial Matters - 28 U.S.C. § 636(b)(1)(A).

A magistrate may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in Subsection D, below.

D. Recommendations Regarding Case-Dispositive Motions - 28 U.S.C. § 636(b)(1)(B).

1. A magistrate may submit to a district judge a report containing proposed findings of fact and recommendations for disposition by the district judge of the following pretrial motions in civil and criminal cases:

(a) Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;

(b) Motions for judgment on the pleadings;

(c) Motions for summary judgment;

(d) Motions to dismiss or permit the maintenance of a class action;

(e) Motions to dismiss for failure to state a claim upon which relief may be granted;

(f) Motions to involuntarily dismiss an action;

(g) Motions for review of default judgments;

(h) Motions to dismiss or quash an indictment or information made by a defendant; and

(i) Motions to suppress evidence in a criminal case.

2. A magistrate may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this subsection.

E. Prisoner Cases Under 28 U.S.C. §§ 2254 and 2255.

A magistrate may perform any or all of the duties imposed upon a district judge by the rules governing proceedings in the United States district courts under § 2254 and § 2255 of title 28, United States Code. In so doing, a magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a district judge a report containing proposed findings of fact and recommendations for disposition of the petition by the district judge. Any order disposing of the petition may only be made by a district judge, unless there is consent pursuant to Subsection H of Article I, below.

F. Prisoner Cases Under 42 U.S.C. § 1983.

A magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a district judge a report containing proposed findings of fact recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

G. Special Master References.

A magistrate may be designated by a district judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and rule 53 of the Federal Rules of Civil Procedure. Upon the consent of the parties, a magistrate may be designated by a district judge to serve as a special master in any civil case, notwithstanding the limitations of rule 53(b) of the Federal Rules of Civil Procedure.

H. Conduct of Trials and Disposition of Civil Cases Upon Consent of the Parties - 28 U.S.C. § 636(c).

Upon the consent of the parties, a full-time magistrate may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or non-jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings upon consent of the parties, a magistrate may hear and determine any and all pretrial and posttrial motions which are filed by the parties, including case-dispositive motions.

I. Other Duties.

A magistrate is also authorized to -

1. Exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the district judges;

2. Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings in civil and criminal cases;

3. Conduct arraignments in criminal cases not triable by the magistrate and take not guilty pleas in such cases;

4. Receive grand jury returns in accordance with rule 6(f) of the Federal Rules of Criminal Procedure;

5. Accept waivers of indictment, pursuant to rule 7(b) of the Federal Rules of Criminal Procedure;

6. Conduct voir dire and select petit juries for the court;

7. Accept petit jury verdicts in civil cases in the absence of a district judge;

8. Conduct necessary proceedings leading to the potential revocation of probation;

9. Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

10. Order the exoneration or forfeiture of bonds;

11. Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

12. Conduct examinations of judgment debtors in accordance with rule 69 of the Federal Rules of Civil Procedure;

13. Conduct proceedings for initial commitment of narcotics addicts under title III of the Narcotic Addict Rehabilitation Act;

14. Perform the functions specified in 18 U.S.C. §§ 4107, 4108 and 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein;

15. Perform any additional duty as is not inconsistent with the Constitution and the laws of the United States.

ARTICLE II. ASSIGNMENT OF MATTERS TO MAGISTRATES

A. Criminal Cases.

1. Misdemeanor Cases. All misdemeanor cases shall be assigned, upon the filing of an information, complaint or violation notice, or the return of an indictment, to a magistrate by random selection, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

2. Felony Cases. Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk of court to a magistrate for the conduct of an arraignment and such pretrial conferences or omnibus hearings as are necessary, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with the subsections C and D of Article I, above.

B. Civil Cases.

1. Any district judge may order that any civil case be assigned by the clerk of court to a magistrate for the conduct of conferences, hearings and other proceedings, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Subsection C of Article I, above. Where designated by a district judge, the magistrate may conduct conferences, hearings and other proceedings, and hear the motions and perform the duties set forth in Subsections D through F of Article I, above. Where the parties consent to trial and disposition of a case by a magistrate under Subsection H of Article I, above, such case shall, with the approval of the district judge to whom it was assigned at the time of filing, be reassigned to a magistrate for the conduct of all further proceedings and the entry of judgment.

C. General.

Nothing in these rules shall preclude the court or any district judge from reserving any proceeding for conduct by a district judge, rather than a magistrate. The court, moreover,

may by order modify the method of assigning proceedings to a magistrate as changing conditions may warrant.

ARTICLE III. PROCEDURES BEFORE THE MAGISTRATE

A. In General.

In performing duties for the court, a magistrate shall conform to all applicable provisions of federal statutes and rules, to the general procedural rules of this court, and to the requirements specified in any order of reference from a district judge.

B. Special Provisions for the Disposition of Civil Cases by a Magistrate on Consent of the Parties - 28 U.S.C. § 636(c).

1. Notice.

The clerk of court shall notify the parties in all civil cases that they may consent to have a magistrate conduct any or all proceedings in the case and order the entry of a final judgment. Such notice shall be handed or mailed to the plaintiff or his representative at the time an action is filed and to other parties as attachments to copies of the complaint and summons, when served. Additional notices may be furnished to the parties at later stages of the proceedings, and may be included with pretrial notices and instructions.

2. Execution of Consent.

The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any district judge or magistrate, unless all parties have consented to the reference to a magistrate. No district judge, magistrate, or other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a district judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

3. Reference.

After the consent form has been executed and filed, the clerk shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate. Once the case has been assigned to a magistrate, the magistrate shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the clerk of court to enter a final judgment in the same manner as if a district judge had presided.

ARTICLE IV. REVIEW AND APPEAL OF MAGISTRATE CASES

A. Appeal of Non-Dispositive Matters - 28 U.S.C.§ 636(b)(1)(A).

Any party may appeal from a magistrate's order determining a motion or matter under Subsection C of Article I, above, within 10 days after issuance of the magistrate's order, unless a different time is prescribed by the magistrate or a district judge. Such party shall file with the clerk of court, and serve on the magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A district judge shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The district judge may also reconsider sua sponte any matter determined by a magistrate under this rule.

B. Review of Case-Dispositive Motions and Prisoner Litigation - 28 U.S.C. § 636(b)(1)(B).

Any party may object to a magistrate's proposed findings, recommendations or report under Subsections D, E, and F of Article I, above, within 10 days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A district judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The district judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

C. Special Master Reports - 28 U.S.C. § 636(b)(2).

Any party may seek review of, or action on, a special master report filed by a magistrate in accordance with the provisions of rule 53(e) of the Federal Rules of Civil Procedure.

D. Appeal from Judgments in Misdemeanor Cases - 18 U.S.C. § 3402.

A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States attorney. The scope of appeal shall

parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).

(d) Memoranda.

The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum with the clerk, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellant shall also serve a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

(e) Disposition of the Appeal by a District Judge.

The district judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The district judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

(f) Appeals from other Orders of a Magistrate.

Appeals from any other decisions and orders of a magistrate not provided for in this Article should be taken as provided by governing statute, rule, or decisional law.

be the same as on an appeal from a judgment of the district court to the court of appeals.

E. Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties - 28 U.S.C. § 636(c).

1. Appeal to the Court of Appeals.

Upon the entry of judgment in any civil case disposed of by a magistrate on consent of the parties under authority of 28 U.S.C. § 636(c) and subsection H of Article I, above ,an aggrieved party shall appeal directly to the United States court of appeals for this circuit in the same manner as an appeal from any other judgment of this court.

2. Appeal to a District Judge.

(a) Notice of Appeal.

In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate to a district judge, rather than directly to the court of appeals. In such case the appeal shall be taken by filing a notice of appeal with the clerk of court within 10 days after entry of the magistrate's judgment; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate or a district judge may extend the time for filing the notice of appeal for an additional 20 days. Any request for such extension, however, must be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

(b) Service of the Notice of Appeal.

The clerk of court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his last known address.

(c) Record on Appeal.

The record on appeal to a district judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF

A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. § 636(c), you are hereby notified that the United States Magistrates of this Court, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Copies of appropriate consent forms for this purpose are available from the Clerk of Court.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the Clerk. Only if all the parties to the case consent to the reference to a magistrate will either the judge or magistrate to whom the case has been assigned be informed of your decision.

Your opportunity to have your case disposed of by a magistrate is subject to the calendar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a magistrate for dispostion. References will be made in a manner which will avoid assigning only certain types of cases to the magistrates.

At the time of giving consent to trial by a magistrate, a choice must be made between appeal to the Court of Appeals and appeal to a district judge. If appeal is to a district judge, the Court of Appeals may refuse to review the case further.

Jesse E. Clark

Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Plaintiff	)	
VS.	)	Civil Action No.
Defendant	)	

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE - CIVIL CASE

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before a district judge of the Court and consent to have a United States magistrate selected at random conduct any and all further proceedings in the case, including the trial, and order the entry of judgment.

_____	_____
_____	_____
_____	_____
_____	_____

Any appeal shall be taken to the United States Court of Appeals for the Fifth Circuit, in accordance with 28 U.S.C. § 636(c)(3), unless all parties further consent, by signing below, to take any appeal to a judge of the district court, in accordance with 28 U.S.C. § 636(c)(4).

_____	_____
_____	_____
_____	_____
_____	_____

NOTE: RETURN THIS FORM TO THE CLERK OF COURT ONLY IF IT HAS BEEN EXECUTED BY ALL PARTIES TO THE CASE.

_____

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the Clerk of the Court assign the above-captioned matter to a United States magistrate by established procedure for conducting all further proceedings and the entry of final judgment in accordance with § 636(c) and the above consent of the parties.

_____ _____
Date United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

United States of America	§	
VS.	§	Docket No. _____
_____	§	

CONSENT TO PROCEED BEFORE UNITED STATES MAGISTRATE - PETTY OFFENSE (In accordance with 18 U.S.C. § 3401)

The United States Magistrate has fully informed me of my right to counsel and of my right to trial, judgment, and sentencing before a judge of the United States district court. I have also been advised that I do not have a right to trial by jury.

I HEREBY:

(1) Waive my right to trial, judgment, and sentencing before a United States district judge; and

(2) Consent to have the charges against me disposed of before the United States Magistrate including trial, judgment and sentencing.

_____,
Defendant

_____

Date _____

Before _____
United States Magistrate

(3)

Supreme Court, U.S.
FILED
OCT 1 2002
CLERK

No. 02-69

In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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Attorney General of Texas

HOWARD G. BALDWIN, JR.
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TABLE OF CONTENTS

Table of Contents i

Index of Authorities ii

Argument 1

I. The Court Should Resolve the Circuit Conflict over Post-Judgment Consent 1

II. No Obstacles Impede Review of the Question Presented 2

III. The Fifth Circuit's Jurisdictional View of Consent Is Inconsistent With Other Circuits' Views on §636 and Merits Consideration by This Court 6

IV. The Court Should Decline to Address Respondent's Additional "Question Presented" 7

Conclusion 9

INDEX OF AUTHORITIES

Cases

Bell & Beckwith v. United States, 766 F.2d 910 (CA6 1985) .. 8

Clark v. Poulton, 963 F.2d 1361 (CA10 1992) 6

Collins v. Foreman, 729 F.2d 108 (CA2), *cert. denied*, 469 U.S. 870 (1984) 8

D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (CA Fed. 1985), *cert. denied*, 474 U.S. 825 (1985) 8

Demarest v. Manspeaker, 498 U.S. 184 (1991) 3, 8

Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 5

Field v. Wash. Metro. Area Trans. Auth., 743 F.2d 890 (CADC 1984) 8

Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281 (CA4 1985) 8

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (CA7 1984) 6, 8, 9

Goldstein v. Kelleher, 728 F.2d 32 (CA1), *cert. denied*, 469 U.S. 852 (1984) 8

Granfinanciera v. Nordberg, 492 U.S. 33 (1989) 3, 8

In re Griego, 64 F.3d 580 (CA10 1995) 6

Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313 (CA8 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985) 8

Lytle v. Household Mfg., 494 U.S. 545 (1990) 3, 8

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 3, 8

McNab v. J & J Marine, Inc., 240 F.3d 1326 (CA11 2001) (per curiam) 5

Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 725 F.2d 537 (CA9) (en banc), *cert. denied*, 469 U.S. 824 (1984) 6, 8

Peretz v. United States, 501 U.S. 923 (1991) 1

Puryear v. Ede's Ltd., 731 F.2d 1153 (CA5 1984) 9

Rembert v. Apfel, 213 F.3d 1331 (CA11 2000) 5

Sinclair v. Wainwright, 814 F.2d 1516 (CA11 1987) 8

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) ... 2

Wharton-Thomas v. United States, 721 F.2d 922 (CA3 1983) 6, 9

Constitutional Provisions, Statutes, and Rules

28 U.S.C. §636 6

28 U.S.C. §636(b) 6

28 U.S.C. §636(c) ..... *passim*

28 U.S.C. §1291 ..... 2, 4, 5

28 U.S.C. §1331 4

FED. R. CIV. P. 83 4

SUP. CT. R. 10(a) 9

U.S. CONST. art. I, §8, cl. 9 4

U.S. CONST. art. III, §1 4

ARGUMENT

Unable to dispute that circuits are divided over the permissibility of post-judgment consent under 28 U.S.C. §636(c), Withrow attempts to diminish the importance of this question by erecting barriers to review—none of which exist. This case squarely presents the issue, and the Court should grant the petition for writ of certiorari to resolve this important and unsettled question of federal law.

I. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT OVER POST-JUDGMENT CONSENT.

Although Withrow attempts to marginalize the issue of post-judgment consent under §636(c), the substantial circuit split belies his characterization. Four courts of appeals have repeatedly addressed the question and remain deeply divided on the answer. *See* Pet. 9-11 (citing conflicting decisions from the Fifth Circuit (which categorically rejects post-judgment consent), the Ninth Circuit (which generally rejects post-judgment consent), and the Seventh and Eleventh Circuits (which uniformly accept post-judgment consent)).

The persistent conflict over post-judgment consent infuses uncertainty into the federal judicial system, disadvantaging litigants and district courts that continue to struggle with expanding dockets and rely on magistrate judges to expedite case resolution. Judicial—and litigant—resources are squandered when, as in Withrow's case, an appellate court nullifies a jury verdict and judgment by rejecting post-judgment consent. Because of "the importance of magistrates to an efficient federal court system," *Peretz v. United States*, 501 U.S. 923, 929 (1991), the Court should grant the petition and resolve whether post-judgment consent satisfies the requirements of §636(c).

II. No Obstacles Impede Review of the Question Presented.

Attempting to dissuade the Court from granting the petition for writ of certiorari, Withrow conjures up obstacles to review that do not exist. For example, Withrow erroneously contends that the Court "has no basis for reaching the question presented" because Petitioners' post-judgment consent was "at odds" with their failure to expressly consent before judgment—either in writing or orally. Br. Opp'n 10-12. This argument defies logic. Had there been express written or oral consent prior to judgment, the sufficiency of post-judgment consent under §636(c) would not be at issue. Indeed, it is the absence of express pre-judgment consent that squarely places the post-judgment-consent question before the Court.

Moreover, Withrow does not dispute that, prior to judgment, Petitioners never challenged, questioned, or objected to the magistrate judge's repeated assertions of authority to preside over the case for all purposes, including entry of final judgment, *see, e.g.*, Pet. 26a, 27a; *cf. id.* 21a, and that Petitioners proceeded to try the case before the magistrate judge and a jury. If such pre-judgment conduct is "at odds" with consent, Br. Opp'n 12, then no case would present this question.

Withrow also raises alternative grounds for affirmance based on the local rules for the Southern District of Texas and 28 U.S.C. §1291, but neither ground poses an obstacle to review. Although a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), Withrow did not raise these arguments below. The Court has consistently refused to consider alternative grounds for affirmance advanced for the first time in this Court. *See, e.g.,*

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Lytle v. Household Mfg.*, 494 U.S. 545, 551 n.3 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (1989). Accordingly, Withrow's new alternative grounds present no obstacle to resolving the issue of post-judgment consent, on which the Fifth Circuit's judgment rests. *See, e.g. Demarest*, 498 U.S., at 188-89 (rejecting respondent's argument that alternative grounds for affirmance, raised for the first time in this Court, hindered consideration of the question presented).

Regardless, Withrow's two alternative grounds are not viable and, therefore, would not impede consideration of the post-judgment-consent question in this case. First, Withrow misplaces reliance on the local rules for the Southern District of Texas, which require all parties' consent prior to a magistrate-judge referral.[1] Neither the district court nor the Fifth Circuit mentioned local requirements in rejecting Petitioners' post-judgment consent. *See* Pet. 1a-11a, 14a-19a.[2] Instead, both courts premised their holdings directly on 28 U.S.C. §636(c)—mistakenly concluding that a lack of express consent destroys subject-matter jurisdiction and, therefore, can be neither waived nor cured by post-judgment consent. Pet. 3a, 14a, 18a; *see also id.* 13a. Because local rules do

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1. Under the local rules, it is the responsibility of the *plaintiff*—Withrow in this case—to secure all parties' written consent and to file the requisite forms with the district-court clerk prior to referral of a case to a magistrate judge. *See* Br. Opp'n 3 (quoting General Order No. 80-5 (superseded by General Order 2001-6)). It would be perverse for Withrow to obtain a new trial based on his own failure to obey the local rules.

2. Withrow concedes that the local-rules argument was not raised in the Fifth Circuit but suggests it is "preserved in the record below." Br. Opp'n 15. As the argument also was not made in the district court, it should not be considered for the first time by this Court.

not determine subject-matter jurisdiction,[3] they could not afford an alternative ground for the lower courts' jurisdictional holdings. Accordingly, Withrow's local-rules argument would be immaterial to the Court's review of the Fifth Circuit's judgment.[4]

Nor can Withrow manufacture an obstacle to review by hypothesizing, as a second alternative ground for affirmance, that the Fifth Circuit's judgment could be based on lack of appellate jurisdiction under 28 U.S.C. §1291, not lack of subject-matter jurisdiction in the district court. *See* Br. Opp'n 20-22 (suggesting that a judgment by a magistrate judge lacking pre-judgment consent is an interlocutory report and recommendation that cannot be appealed under §1291). The plain language of the Fifth Circuit's

3. District courts may develop local rules governing docket-management and courtroom practices, *see* FED. R. CIV. P. 83, but such rules cannot divest a court of subject-matter jurisdiction—which is constitutionally conferred and defined by an act of Congress. *See id.*; *see also* U.S. CONST. art. I, §8, cl. 9; *id.* art. III, §1; 28 U.S.C. §1331 (establishing federal-question jurisdiction, which applies to Withrow's suit).

4. Withrow erroneously contends that Petitioners cannot challenge the Fifth Circuit's jurisdictional view of consent because a sentence in the "Standard of Review" section of Petitioners' Fifth Circuit brief stated that "jurisdictional questions" are reviewed *de novo*. Br. Opp'n 19. As Fifth Circuit precedent (and the limited remand order in Withrow's case) already classified §636(c) consent as a jurisdictional question, Pet. 13a, the brief recited that circuit's standard of review for such questions. By contrast, the issues and argument sections of the brief consistently framed the issue in terms of the *magistrate judge*'s jurisdiction (*i.e.*, authority) to conduct the trial and to enter judgment—not the existence of subject-matter jurisdiction over Withrow's suit. *See* Appellees' Br. 1-5, *Withrow v. Roell*, No. 00-40627, in the United States Court of Appeals for the Fifth Circuit.

opinion—and the relief afforded therein—dispels this revisionist theory.

Under Withrow's hypothetical, the Fifth Circuit silently regarded the trial-court judgment as an interlocutory report and recommendation. As Withrow acknowledges, however, the proper disposition for a premature appeal is dismissal for lack of appellate jurisdiction. *See* Br. Opp'n 21-22; *see also, e.g., McNab v. J & J Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001) (per curiam); *Rembert v. Apfel*, 213 F.3d 1331, 1333, 1335 (CA11 2000). That is not what the Fifth Circuit did. Instead, the Fifth Circuit vacated the trial-court judgment, voided the jury verdict, and remanded for a new trial. Pet. 10a-11a. That relief exceeds what the Fifth Circuit could have granted in a dismissal for lack of appellate jurisdiction pursuant to 28 U.S.C. §1291. *See McNab*, 240 F.3d, at 1327-28; *Rembert*, 213 F.3d, at 1335. The terms of the Fifth Circuit's judgment, therefore, negate Withrow's theory.

Indeed, because Withrow's §1291 theory would require modification of the Fifth Circuit's judgment, it is not an argument he can advance, as Respondent, without filing a cross-petition. *See, e.g., Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (reiterating that, absent a cross-petition, respondent cannot advance an argument that would modify the judgment in any manner—even by affording less relief to respondent).

This case squarely presents the question whether post-judgment consent satisfies the referral requirements of §636(c), and no obstacles impede review. The Court should grant the petition and resolve this important and unsettled question of federal law.

III. THE FIFTH CIRCUIT'S JURISDICTIONAL VIEW OF CONSENT IS INCONSISTENT WITH OTHER CIRCUITS' VIEWS ON §636 AND MERITS CONSIDERATION BY THIS COURT.

The Fifth Circuit's jurisdictional view of consent is inconsistent with Tenth Circuit decisions holding that defects in §636 referrals do not implicate subject-matter jurisdiction. *See In re Griego*, 64 F.3d 580, 583 (CA10 1995); *Clark v. Poulton*, 963 F.2d 1361, 1366-67 (CA10 1992). Although Withrow contends these decisions are inapposite because they involved defects under §636(b)—pursuant to which a district-court judge enters the final judgment, *see* Br. Opp'n 21—the Tenth Circuit's reasoning was not based on that distinction. *See Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67. Indeed, *Clark* reviewed the statutory structure of §636 as a whole before distinguishing a magistrate judge's statutory authority from subject-matter jurisdiction. 963 F.2d, at 1363-64, 1366-67.

Moreover, the Third, Seventh, and Ninth Circuits have drawn distinctions between statutory authority and subject-matter jurisdiction in cases involving final judgments entered by magistrate judges pursuant to §636(c)—the precise provision at issue in this case. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041 (CA7 1984) (explaining that parties' consent under §636(c) is a personal right subject to waiver, not a question of subject-matter jurisdiction); *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 543 (CA9 1984) (en banc) (noting that consent to a magistrate judge under §636(c) is akin to personal jurisdiction—which, unlike subject-matter jurisdiction, can be waived by agreement or failure to object); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (CA3 1983) (reasoning that issues of consent under §636(c) are subject to waiver because they relate "not to the jurisdiction of the district court as an entity, but to the judicial officer within the court who conducted the trial").

The inconsistency between these decisions and the Fifth Circuit's jurisdictional view of consent presents another reason why this case merits consideration by the Court. If a jurisdictional approach to consent is not required by §636(c), the Fifth Circuit had no basis to vacate the final judgment and void the jury verdict, squandering judicial—and litigant—resources when no party claimed the magistrate judge proceeded without that party's consent. Accordingly, the Court should grant the petition not only to resolve the circuit split over post-judgment consent, but also to clarify whether defects in the §636(c) referral process implicate subject-matter jurisdiction and require *sua sponte* investigation by appellate courts.

IV. THE COURT SHOULD DECLINE TO ADDRESS RESPONDENT'S ADDITIONAL "QUESTION PRESENTED."

The Brief in Opposition lists a second question presented that challenges—for the first time in this Court—the constitutionality of provisions of the Federal Magistrate Act that permit magistrate judges to preside over civil trials and enter final judgments. *See* Br. Opp'n i, 18-19. The Court should grant the petition for certiorari on the question presented by Petitioners but decline to consider Withrow's new question.

Far from challenging the constitutionality of the Federal Magistrate Act, Withrow consented to proceed before a magistrate judge and did not question that judge's authority until he lost a jury trial and appealed the adverse judgment. Even then, Withrow never contended that the Act itself was unconstitutional. Rather, he argued that §636(c) does not permit post-judgment consent, and the Fifth Circuit agreed. If, however, post-judgment consent confirms a magistrate judge's authority to conduct trial and to enter a final judgment—as Petitioners maintain, and as the Seventh and Eleventh Circuits have held—Withrow should be bound by the bargain he struck. This Court should not entertain a belated

challenge to the magistrate-judge provisions Withrow invoked to expedite resolution of his case. *See Geras*, 742 F.2d, at 1041 (stating that parties who consent to proceed before a magistrate judge "should not be allowed to challenge the constitutionality of the provisions under which they voluntarily chose to proceed").

Additionally, the Court should decline to consider Withrow's new question because it introduces an argument advanced for the first time in this Court. *See, e.g., Matsushita*, 516 U.S., at 379 n.5; *Lytle*, 494 U.S., at 551 n.3; *Demarest*, 498 U.S., at 188-89; *Granfinanciera*, 492 U.S., at 38-39. Without any lower-court decision on the constitutionality of the Federal Magistrate Act, it would be inadvisable to address this issue. *See, e.g., Lytle*, 494 U.S., at 551 n.3 (observing that considering a new question "without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion").

Moreover, the question does not warrant consideration because all of the circuits to consider constitutional challenges to the Act—including the Fifth Circuit—have uniformly upheld the consensual referral provisions in §636(c), and this Court has consistently declined to review those decisions. *See D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (CA Fed.), *cert. denied*, 474 U.S. 825 (1985); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1315-16 (CA8 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985); *Collins v. Foreman*, 729 F.2d 108, 109-110 (CA2), *cert. denied*, 469 U.S. 870 (1984); *Goldstein v. Kelleher*, 728 F.2d 32, 36 (CA1), *cert. denied*, 469 U.S. 852 (1984); *Pacemaker Diagnostic Clinic of Am. v. Instromedix Inc.*, 725 F.2d 537, 547 (CA9) (en banc), *cert. denied*, 469 U.S. 824 (1984); *see also Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (CA11 1987); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (CA6 1985); *Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1284-85 (CA4 1985); *Field v. Wash. Metro. Area Trans. Auth.*, 743 F.2d 890, 893-95 (CADC 1984); *Geras v. Lafayette*

Display Fixtures, Inc., 742 F.2d 1037, 1045 (CA7 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (CA5 1984); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (CA3 1983). Thus, there is no conflict to resolve, *see* SUP. CT. R. 10(a), and no extraordinary circumstance to justify Withrow's raising the issue for the first time in this Court.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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No. 02-69

In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,

Petitioners,

v.

JON MICHAEL WITHROW,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

When a district court, upon the plaintiff's written consent, refers a case to a magistrate judge for trial, *see* 28 U.S.C. §636(c), and all parties, the magistrate judge, and the jury proceed in a manner consistent with that referral, must a court of appeals *sua sponte* vacate the judgment for lack of jurisdiction because defendants did not expressly consent before trial, or can defendants cure that alleged defect by confirming, in a post-judgment filing with the district court, their consent to trial before the magistrate judge?

LIST OF PARTIES

The caption includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 14.1(b). Petitioners note, however, that the Fifth Circuit caption lists a fourth "Defendant-Appellee," Jerry Ballard. Pet. App. 1a. Ballard was not a party in the Fifth Circuit.

Plaintiff Withrow's claims against Ballard were dismissed prior to service and, therefore, Ballard never appeared at trial or in the Fifth Circuit. *See* R.713, 809.[1] Accordingly, Petitioners do not list Ballard as a party "to the proceeding in the court whose judgment is sought to be reviewed." SUP. CT. R. 14.1(b).

[1] References to documents that are in the Fifth Circuit record, but not included in the Joint Appendix or Appendix to the Petition for Writ of Certiorari, will be designated "R.[page #]."

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	vi
Opinions and Orders	1
Jurisdiction	2
Statutory Provision Involved	2
Statement of the Case	2
Summary of Argument	8
Argument	10
I. A Magistrate Judge Has Authority Under 28 U.S.C. §636(c) to Try a Case and Direct Entry of Judgment When Parties Proceed in a Manner Consistent with Consent and Expressly Confirm Their Consent Post-Judgment	10
A. The Plain Terms of §636(c) Encompass All Types of Voluntary Consent and Conspicuously Omit Limitations on Form	12
B. The Established Guideposts for Construing the Federal Magistrates Act—Structure, Purpose, and Policy—Support the Permissibility of Post-Judgment Consent	15
1. The structure and purpose of the Act reflect Congress's intent to improve judicial efficiency and increase access to courts	16

TABLE OF CONTENTS—Continued

Page

2. The purpose of §636(c)'s consent requirement is to prohibit coercive referrals, not impose technical constraints on magistrate judges' civil-trial authority 22

3. The Court should construe §636(c)'s consent requirement broadly to comport with the policy behind the Federal Magistrates Act 25

C. Post-Judgment Confirmatory Consent Satisfies §636(c)'s Voluntariness Requirement and Furthers the Federal Magistrates Act's Access and Efficiency Goals 28

1. In construing §636(c), the Court should not ignore the practical realities of district-court proceedings that reflect parties' voluntary consent 29

2. Post-judgment consent is a type of express consent that satisfies §636(c) 31

3. Congressional intent, not game theory, should guide the Court's construction of §636(c) 34

II. Section 636(c) Neither Implicates Subject-Matter Jurisdiction Nor Requires Appellate Courts To Nullify Judgments, *Sua Sponte*, for Lack of Consent 36

A. Consensual Referrals Under §636(c) Do Not Implicate Subject-Matter Jurisdiction 37

TABLE OF CONTENTS—Continued

Page

B. Appellate Courts Should Not Vacate Final Judgments Based on Referral Defects to Which No Party Objects 42

Conclusion 44

APPENDIX

28 U.S.C. §636 ..... 1a

TABLE OF AUTHORITIES

Page

Cases

Am. Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381 (CA7 1995) 12

Ambrose v. Welch, 729 F.2d 1084 (CA6 1984) (per curiam) 32

Archie v. Christian, 808 F.2d 1132 (CA5 1987) (en banc) 31, 42

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 37

Ball v. United States, 140 U.S. 118 (1891) 43

Caprera v. Jacobs, 790 F.2d 442 (CA5 1986) 35, 36

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 29

Clark v. Poulton, 963 F.2d 1361 (CA10 1992) 40

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 33

Gen. Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485 (CA11 1997) 11

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (CA7 1984) 38, 40

Gomez v. United States, 490 U.S. 858 (1989) 15, 38

Hajek v. Burlington N. R.R. Co., 186 F.3d 1105 (CA9 1999) 7, 8, 12

In re Griego, 64 F.3d 580 (CA10 1995) 40

Kadonsky v. United States, 216 F.3d 499 (CA5 2000), *cert. denied*, 531 U.S. 1176 (2001) 30

King v. Ionization Int'l, Inc., 825 F.2d 1180 (CA7 1987) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Kofoed v. Int'l Bhd. of Elec. Workers, Local 48, 237 F.3d 1001 (CA9 2001) 12, 30, 32, 43

Mathews v. Weber, 423 U.S. 261 (1976) 16

McCarthy v. Bronson, 500 U.S. 136 (1991) ..... *passim*

McNab v. J. & J. Marine, Inc., 240 F.3d 1326 (CA11 2001) 43

McDowell v. United States, 159 U.S. 596 (1895) 43

N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc., 996 F.2d 21 (CA 1993) 30, 32

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (CA9 1984) 37, 38, 40

Peretz v. United States, 501 U.S. 923 (1991) ..... *passim*

Rembert v. Apfel, 213 F.3d 1331 (CA11 2000) 32

Roell v. Withrow, 123 S.Ct. 512 (2002) 2

Russello v. United States, 464 U.S. 16 (1983) 13, 15

Silberstein v. Silberstein, 859 F.2d 40 (CA7 1988) 30

Smith v. Shawnee Library Sys., 60 F.3d 317 (CA7 1995) 31, 35, 36

Spears v. McCotter, 766 F.2d 179 (CA5 1985) 2, 3, 4

United States v. Goodyear Tire & Rubber Co., 493 U.S. 132 (1990) 22

United States v. Raddatz, 447 U.S. 667 (1980) 15, 17, 28

Watt v. W. Nuclear, Inc., 462 U.S. 36 (1983) 21

Wharton-Thomas v. United States, 721 F.2d 922 (CA3 1983) 38, 40

Williams v. Taylor, 529 U.S. 420 (2000) 12

TABLE OF AUTHORITIES—Continued

	Page
Wingo v. Wedding, 418 U.S. 461 (1974)	16, 17
Withrow v. Roell, 288 F.3d 199 (CA5 2002)	1

Statutes and Rules

18 U.S.C. §3401	14
18 U.S.C. §3401(b)	14
28 U.S.C. §636	*passim*
28 U.S.C. §636(b)	20, 40
28 U.S.C. §636(b)(1)	2, 28
28 U.S.C. §636(b)(1)(A)	17
28 U.S.C. §636(b)(1)(B)	17, 25, 27
28 U.S.C. §636(b)(1)(C)	17
28 U.S.C. §636(b)(3)	*passim*
28 U.S.C. §636(c)	*passim*
28 U.S.C. §636(c)(1)	*passim*
28 U.S.C. §636(c)(2)	*passim*
28 U.S.C. §636(c)(3)	43, 44
28 U.S.C. §636(e)	20
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	43
28 U.S.C. §1331	37, 38
28 U.S.C. §1915	3
28 U.S.C. §1915A(b)	3
42 U.S.C. §1983	2
C.D. CAL. R. 6.6.3	26

TABLE OF AUTHORITIES—Continued

	Page
D. COLO. R. 72.2(D)	26
D. OR. R. 72.1	26
D.D.C. R. 73.1(b)	26
FED. R. CIV. P. 73	30
N.D. ALA. R. 73.2(c)	26
S.D. TEX. GEN. ORDER NO. 80-5	27
S.D. TEX. GEN. ORDER NO. 2001-6	27
SUP. CT. R. 13.1	2
SUP. CT. R. 14.1(b)	ii

Other Authorities

Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (1976)	17
ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS (2001)	20
COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES (1993 & Supp. 1994)	30, 32
Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary, 96th Cong. (1979)	10, 39
Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996)	14
Federal Courts Improvement Act of 1999, Pub. L. No. 106-518, 114 Stat. 2410 (2000)	14, 20

TABLE OF AUTHORITIES—Continued

Page

Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) 14, 16

Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979) 10, 11, 18

H.R. REP. NO. 1629 (1968) 16

H.R. REP. NO. 94-1609 (1976) 17

H.R. REP. NO. 95-1364 (1978) 17, 18, 26

H.R. REP. NO. 96-287 (1979) ..... *passim*

H.R. REP. NO. 101-734 (1990) ..... *passim*

Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) 19

MAGISTRATE JUDGES DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (3d ed. 1999) 18, 26, 39

MAGISTRATE JUDGES DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY (June 2002) 26, 32

Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979) ..... *passim*

Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995) 20

S. CONF. REP. NO. 96-322 (1979) 23

S. REP. NO. 94-625 (1976) 25

S. REP. NO. 96-74 (1979) 10, 18, 23, 26

S. REP. NO. 104-366 (1996) 14, 19

PETITIONERS' BRIEF

This case presents a question of statutory construction: whether a magistrate judge has authority under 28 U.S.C. §636(c) to preside over a jury trial and to direct entry of judgment when all parties voluntarily proceed before the magistrate judge and two defendants who neglected to file consent forms confirm their consent in a post-judgment filing with the district court. The Fifth Circuit erroneously held that §636(c) prohibits post-judgment consent and that the absence of express pretrial consent is a jurisdictional defect that cannot be waived. Such reasoning confuses magistrate judges' authority with subject-matter jurisdiction and interjects formalistic constraints on consent that are neither supported by the text of §636(c) nor the structure, purpose, and policy behind the Federal Magistrates Act. The Court should reverse the Fifth Circuit's judgment and hold that post-judgment confirmation of consent satisfies §636(c).

OPINIONS AND ORDERS

The Fifth Circuit's opinion is reported as *Withrow v. Roell*, 288 F.3d 199 (CA5 2002). Pet. App. 1a. The Fifth Circuit's limited remand order is unreported. Pet. App. 12a. Also unreported are the district court's order on remand adopting the magistrate judge's report and recommendation on consent, Pet. App. 14a, and the report and recommendation itself. Pet. App. 16a. The magistrate judge's final judgment on the merits, which the Fifth Circuit vacated for lack of consent, is unreported. Pet. App. 28a.

JURISDICTION

The Fifth Circuit issued its judgment and opinion on April 8, 2002. Joseph C. Roell, Petra Garibay, and James Reagan timely petitioned for writ of certiorari on July 8, 2002, *see* SUP. CT. R. 13.1, invoking the Court's jurisdiction under 28 U.S.C. §1254(1). The Court granted the petition for writ of certiorari on November 4, 2002. *Roell v. Withrow*, 123 S.Ct. 512 (2002).

STATUTORY PROVISION INVOLVED

The complete text of 28 U.S.C. §636 is printed in the appendix to this brief.

STATEMENT OF THE CASE

Jon Michael Withrow, an inmate in custody of the Texas Department of Criminal Justice (TDCJ), brought this *pro se* suit under 42 U.S.C. §1983 alleging that various TDCJ doctors and nurses were deliberately indifferent to his medical needs when he injured an ankle dismounting his cell bunk.

Prior to service on the TDCJ defendants, the district court referred Withrow's suit to a magistrate judge for an evidentiary "*Spears* hearing" to assess Withrow's claims. *See* J.A. 9-10.[2] A representative from the Attorney General's Office attended, as did Withrow. *Id.*

[2] The term "*Spears* hearing" comes from *Spears v. McCotter*, in which the Fifth Circuit approved the district-court practice of referring prisoner suits to magistrate judges, pursuant to 28 U.S.C. §636(b)(1), to identify frivolous suits that cannot be pursued *in forma pauperis* under 28 U.S.C. §1915 or suits that should be dismissed for failure to state a claim. 766 F.2d 179 (CA5 1985); *see also* R.809 (describing Withrow's *Spears* hearing and noting that 28 U.S.C. §1915A(b) provides for dismissal of prisoner suits that are frivolous, malicious, or fail to state a claim).

At the hearing, the magistrate judge informed Withrow that his case had been assigned to a United States District Judge. The magistrate judge explained that she was conducting the *Spears* hearing "to learn a little bit more about [his] claims," but that her power to act on the case was limited by law. J.A. 10. She added, however, that she could make all decisions in the case—including final decisions—if Withrow and the defendants provided consent. J.A. 10-11. The magistrate judge further explained that Withrow was not required to consent and that "[m]y feelings won't be hurt if you don't want to consent, but it will affect how I go about processing your case after today's hearing." J.A. 11. Withrow responded: "I would consent to have you remain as the judge." *Id.*

The magistrate judge next asked whether the assistant attorney general who attended the hearing would consent on behalf of the defendants. *Id.* Because the Attorney General's Office had not yet assigned counsel for the defendants—who had not yet been served—the attorney attending the hearing explained that she "would not be able to consent at this time, but the attorneys that will be assigned will be able to make that decision." *Id.* The magistrate judge asked the attorney to provide a consent form to Withrow and to inquire, upon returning to the Attorney General's Office, whether the persons designated to defend the TDCJ defendants would execute consent

forms. *Id.* The assistant attorney general responded, "Yes, Your Honor, I'll do that." *Id.*

Following the *Spears* hearing, but still prior to service on any of the defendants, Withrow filed written consent to proceed before a magistrate judge pursuant to 28 U.S.C. §636(c). Pet. App. 20a.[3] The form indicated Withrow's waiver of his right to proceed before a district judge and confirmed the magistrate judge's authority to conduct "all further proceedings," including a jury trial and entry of judgment. *Id.*

After Withrow filed his written consent, the district judge referred the action to a magistrate judge for all purposes, including trial and entry of final judgment. Pet. App. 21a. The order noted, however, that the reference would be vacated if any of the defendants, upon service, did not consent. *Id.*

After being served and answering, Defendants Joseph C. Roell, M.D., Petra Garibay, L.V.N., and James Reagan, M.D., filed a motion for summary judgment, which the magistrate judge denied. The magistrate judge's order confirmed that "[b]y order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. §636(c)(1)." Pet. App. 26a. At no point did any of these defendants, or Withrow, object to the magistrate judge's representation of

[3] The district-court docket sheet reflects that Withrow previously executed a consent form at the *Spears* hearing, but that form is not in the record. J.A. 1; *see also* R.821.

her authority—or her ability to rule on the defendants' dispositive motion. Similarly, when the defendants moved for reconsideration of their motion for summary judgment—and the magistrate judge signed the order denying reconsideration, J.A. 3; R.302—no party questioned the magistrate judge's authority to make that ruling.

At a subsequent status conference, the magistrate judge addressed the need to obtain consent from a newly added defendant.[4] J.A. 18-19. The magistrate judge informed counsel for the newly added defendant, who was not represented by the Attorney General's Office, that "your client has the right to not consent to my jurisdiction and I don't know what your position is on that. I'm a Magistrate Judge and both, all of the other parties have consented to my jurisdiction." J.A. 18. Again, Defendants Roell, Garibay, and Reagan did not dispute the magistrate judge's statement regarding consent, and neither did Withrow.

Withrow's claims against Roell, Garibay, and Reagan proceeded to trial before a jury, with the magistrate judge presiding and Withrow representing himself. On the first day of trial, the magistrate judge informed the jurors: "In this case—or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning." Pet. App. 27a. Consistent with all prior proceedings, no party objected to the magistrate judge's authority.

[4] This added defendant, Danny Knutson, settled with Withrow before trial, mooting the issue of his consent.

After hearing the evidence, the jury returned a unanimous verdict for Roell, Garibay, and Reagan, and the magistrate judge ordered the entry of final judgment in their favor. Pet. App. 28a. Withrow appealed, *pro se*, but prior to briefing the Fifth Circuit remanded the case, *sua sponte*, for the limited purpose of determining whether all parties had consented to trial before the magistrate judge. Pet. App. 12a-13a. The remand order noted that the record contained written consent by Withrow and Defendant Reagan, but not the other defendants. Pet. App. 13a. Accordingly, the Fifth Circuit instructed the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." *Id.*

On remand, Defendants Roell, Garibay, and Reagan filed written consent in the district court, expressly stating their "consent to have this case heard by the United States Magistrate Judge . . . for all purposes, including entry of judgment and jury trial." Pet. App. 22a. They also expressly confirmed "that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." *Id.*

The magistrate judge prepared a memorandum and recommendation for the district court, finding that Defendant Reagan was the only defendant who timely filed written consent.[5] Regarding Defendants Roell and

[5] The magistrate judge's order for service of process had directed each defendant to answer and to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. J.A. 12-13; Pet. App. 17a. Defendant Reagan, then represented by private counsel, filed an answer and a separate statement consenting to trial before the magistrate judge. *See* J.A. 2-3. Defendants Roell and Garibay, both represented by an assistant attorney general, filed answers that neglected to include a statement regarding consent. At the time of remand, all three defendants, now represented by the same assistant attorney general, filed a written statement confirming their consent to proceed before the magistrate judge at all times prior and subsequent to entry of judgment. Pet. App. 22a.

Garibay, the magistrate judge determined that "by their actions they clearly implied their consent to the jurisdiction of a magistrate." Pet. App. 19a. Nonetheless, the magistrate judge deemed such actions insufficient because "implied consent does not confer jurisdiction" and Fifth Circuit precedent precludes curing that defect through belated, express consent. *Id.*[6]

Defendants objected to the magistrate judge's report, but the district court adopted her findings and conclusions, agreeing that "Defendants Roell and Garibay did not expressly consent before trial" and that "belated consent is insufficient to cure this jurisdictional defect." Pet. App. 14a (citing *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (CA9 1999)).

The Fifth Circuit agreed. Despite Withrow's and Defendant Reagan's express, pretrial, written consent to proceed before the magistrate judge—and the express, post-judgment consent of Defendants Roell and Garibay—the Fifth Circuit determined that the magistrate judge lacked jurisdiction to try the case and to direct entry of judgment on the jury's verdict. This error, in the Fifth

[6] The magistrate judge also determined that Roell and Garibay had not orally consented at hearings, Pet. App. 17a, and the Fifth Circuit held that this finding was not clearly erroneous. Pet. App. 4a-5a.

Circuit's view, required it to vacate the judgment and to remand the matter for a new trial. Pet. App. 10a-11a.

Acknowledging that the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective under 28 U.S.C. §636(c), the Fifth Circuit rejected these decisions as "contrary to the statute." Pet. App. 5a-10a. Like the district court, the Fifth Circuit referenced the Ninth Circuit's refusal to consider belated consent in *Hajek*, Pet. App. 6a, and aligned itself with that court.

In rejecting the Seventh and Eleventh Circuits' approach—under which belated, express consent cures technical defects in §636(c) referrals—the Fifth Circuit recognized that its repudiation of post-judgment confirmatory consent imposes significant costs: "Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system." Pet. App. 10a.

SUMMARY OF ARGUMENT

In authorizing magistrate judges to conduct civil trials pursuant to 28 U.S.C. §636(c), Congress sought to promote judicial efficiency and increase access to courts by providing an alternative forum for expedient resolution of civil suits. Congress made consent the lynchpin of magistrate judges' authority, but it insisted only that consent be voluntary, not that parties convey consent in a particular manner.

Both the text of the statute and its legislative history confirm that Congress's goal was to combat coercion, not formalize consent. Yet, the Fifth Circuit displaced the statute's flexible terms with a rigid construction of consent

that prohibits parties from expressly confirming—post-judgment—their voluntary and knowing decision to proceed before a magistrate judge. In this case, that formalistic rule defeats all parties' trial expectations, nullifies a jury verdict, and burdens the federal docket by sending the parties back to relitigate claims already adjudicated on the merits. This perverse result is not commanded by the statute, and it defeats Congress's efficiency goals.

The evolution of the Federal Magistrates Act as a whole, and of the civil-trial provisions in §636(c) in particular, support a construction of consent that permits parties to provide express, post-judgment confirmation of their voluntary decision to proceed before a magistrate judge. Such a rule enables parties to retain the benefit of their §636(c) bargain and conserves judicial and litigant resources—which furthers the objectives of the Act. Moreover, post-judgment confirmatory consent satisfies §636(c)'s voluntariness requirements because it rests on two consistent demonstrations of consent: first, an express post-judgment statement; and, second, pre-judgment conduct that clearly evidences consent. In conjunction, these two forms of consent unambiguously establish a magistrate judge's authority to preside over a civil trial and to direct entry of judgment.

In rejecting post-judgment confirmatory consent, the Fifth Circuit rested its decision on a misconception that §636(c) consent is a jurisdictional issue. But statutory consent requirements solely implicate the authority of the magistrate judge, not the subject-matter jurisdiction of the district court. Accordingly, any defect in a §636(c) referral is not a jurisdictional error requiring *sua sponte* investigation, and an appellate court should not question consent—

and unnecessarily overturn jury verdicts and final judgments—when no party protests that the magistrate judge proceeded without that party's consent.

ARGUMENT

I. A MAGISTRATE JUDGE HAS AUTHORITY UNDER 28 U.S.C. §636(C) TO TRY A CASE AND DIRECT ENTRY OF JUDGMENT WHEN PARTIES PROCEED IN A MANNER CONSISTENT WITH CONSENT AND EXPRESSLY CONFIRM THEIR CONSENT POST-JUDGMENT.

The Federal Magistrate Act of 1979 expanded the role of magistrate judges in the federal judicial system by empowering them to exercise civil case-dispositive authority. Pub. L. No. 96-82, §2(2), 93 Stat. 643, 643 (codified as amended at 28 U.S.C. §636(c)). Congress provided that, "[u]pon the consent of the parties," a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." *Id.*

To protect individual litigants' rights and the integrity of the Article III district court, Congress hinged magistrate judges' case-dispositive authority on two factors: (1) the parties' consent; and (2) a special designation by the district court. *See id.* Congress included a consent requirement because litigants proceeding under §636(c) would be waiving their right to proceed before an Article III judge. *See, e.g., Peretz v. United States*, 501 U.S. 923, 931 n.8 (1991); S. REP. NO. 96-74, at 4 (1979); *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm.*

on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary, 96th Cong. 375-80 (1979) [hereinafter "*1979 Hearings*"] (report of U.S. Department of Justice, Office for Improvements in the Administration of Justice (Jan. 19, 1978) [hereinafter "D.O.J. Report"]).

Although the Act specified the need for parties' consent, Congress did not require consent to be given in a particular form. Instead, §636(c) reflects Congress's concern that consent—however given—be voluntary. *See* Pub. L. No. 96-82, §2(2), 93 Stat., at 643 ("Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of consent.") (codified at 28 U.S.C. §636(c)(2)).

In this case, all parties knowingly and voluntarily proceeded before the magistrate judge, who adjudicated dispositive motions, presided over the jury trial, and directed entry of judgment on the jury's verdict—without a single objection from any party. The Fifth Circuit, however, erroneously concluded that all of the litigants' and magistrate judges' efforts were void because two defendants did not file written consent forms prior to entry of judgment. Pet. App. 8a-10a. Moreover, the Fifth Circuit held that the parties who had not previously executed consent forms could not cure that technical defect by confirming their consent, in writing, post-judgment. *Id.*[7]

[7] By contrast, the Seventh and Eleventh Circuits consistently accept various forms of post-judgment consent to effectuate magistrate judges' civil-trial authority under §636(c). *See, e.g., Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (CA11 1997) (holding post-judgment consent effective when parties withdrew their request for a new trial, thereby accepting the magistrate judge's

The Court should reject the Fifth Circuit's formalistic construction of §636(c). Prohibiting post-judgment confirmatory consent is inconsistent with the structure, purpose, and policy of the Federal Magistrates Act, and it impedes Congress's objectives in creating the civil-trial provisions in §636(c). When, as in this case, all parties voluntarily proceed through judgment in a manner consistent with consent—and the parties who previously neglected to memorialize consent do so, in writing, post-judgment—the magistrate judge has full authority under §636(c), and an appellate court should respect the final judgment entered in those proceedings.

A. The Plain Terms of §636(c) Encompass All Types of Voluntary Consent and Conspicuously Omit Limitations on Form.

In construing §636(c), the Court should "start, as always, with the language of the statute." *Williams v.*

authority to enter judgment); *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (CA7 1995) (accepting statement of consent in party's supplemental appellate filing); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (CA7 1987) (relying on parties' joint stipulation to magistrate judge's authority filed weeks after entry of the appealed order); *see also* Pet. 9-11 (detailing the Seventh and Eleventh Circuits' holdings on post-judgment consent).

When post-judgment consent is offered for the first time on appeal, the Ninth Circuit, like the Fifth, deems that form of consent impermissible under §636(c). *See Hajek*, 186 F.3d, at 1108 & n.9. Unlike the Fifth Circuit, however, the Ninth Circuit has been receptive to post-judgment consent filed in the district court. *See Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (CA9 2001) (accepting district-court filing of post-judgment written consent when the party also orally consented prior to the magistrate judge's dispositive ruling).

Taylor, 529 U.S. 420, 431 (2000). Under §636(c), a full-time magistrate judge may exercise case-dispositive authority "[u]pon the consent of the parties." 28 U.S.C. §636(c)(1). Beyond that, the statute "does not require a specific form or time of consent or even that it be in writing." *King*, 825 F.2d, at 1185; *see also* 28 U.S.C. §636(c)(1). The statute merely instructs district courts to enact local rules that "protect the *voluntariness* of the parties' consent." 28 U.S.C. §636(c)(2) (emphasis added). Similarly, it requires judges to advise parties that they may withhold consent without adverse consequences. *See id.* No such directives exist, however, regarding the form of parties' consent. *See id.*

This omission is telling. Other consent provisions in the Act demonstrate that Congress specifies how consent must be given when it intends to condition magistrate judges' authority on the form of parties' consent. A prime example appears in §636(c) itself, which contains a distinct consent procedure for trial before magistrate judges who are not full-time judicial officers. *See* 28 U.S.C. §636(c)(1). Such part-time magistrate judges may exercise civil-trial authority only "[u]pon the consent of the parties, *pursuant to their specific written request*." *Id.* (emphasis added).

Congress imposed no such written-consent requirement, however, on full-time magistrate judges like the magistrate judge who presided over Withrow's trial. *See id.* To stretch the written-consent requirement for part-time judicial officers to cover full-time magistrate judges would defeat the consent distinctions drawn by Congress in the plain text of §636(c)(1). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

In the criminal context, as well, Congress specifies how consent must be given when it intends to condition magistrate judges' authority on the form of consent. Prior to 1996, for example, Congress authorized magistrate judges to conduct misdemeanor trials only if a criminal defendant signed "written consent to be tried before the magistrate that explicitly waives both a trial before a judge of the district court and any right to trial by jury that he may have." Federal Magistrates Act, Pub. L. No. 90-578, §302, 82 Stat. 1107 (1968) (codified as amended at 18 U.S.C. §3401(b)). Although Congress continued to hinge magistrate judges' misdemeanor trial authority on consent after 1996, Congress relaxed the requirements of 18 U.S.C. §3401 to permit consent "made in writing or orally on the record." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, §202(a)(1)-(2), 110 Stat. 3847, 3848-49 (1996) (amending 18 U.S.C. §3401(b)). And Congress eliminated the consent requirement altogether regarding petty offenses. *Id.*; *see* Federal Courts Improvement Act of 1999, Pub. L. No. 106-518, §203, 114 Stat. 2410, 2414 (2000) (codified at 18 U.S.C. §3401(b)); S. REP. NO. 104-366, at 27-28 (1996).

As these criminal provisions demonstrate, Congress has adopted diverse approaches to consent in different magistrate-judge contexts. And Congress knew how to require specific forms of consent when it intended to do so. *See, e.g.*, 18 U.S.C. §3401(b); *see also* 28 U.S.C. §636(c)(1) (regarding part-time judicial officers). For purposes of full-time magistrate judges' authority under §636(c), however,

"Congress did not write the statute that way." *Russello*, 464 U.S., at 23 (citation omitted).

It is significant that Congress chose not to use the form of parties' consent as a constraint on full-time magistrate judges' case-dispositive authority. *See* 28 U.S.C. §636(c)(1). The Fifth Circuit was not free to limit that broad grant of authority by supplementing the statute with formalistic requirements that unjustifiably impede §636(c) referrals.

In light of the generality of §636(c)'s consent requirement, the Court should construe the statute in a manner consistent with the flexibility inherent in its terms. *Cf. Peretz*, 501 U.S., at 932 (reasoning that the "generality of the category of 'additional duties'" assignable to magistrate judges under §636(b)(3) "indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process"). Because post-judgment consent confirms a party's voluntary decision to proceed before a magistrate judge, it is a form of consent that complies with the plain terms of §636(c).

B. The Established Guideposts for Construing the Federal Magistrates Act—Structure, Purpose, and Policy—Support the Permissibility of Post-Judgment Consent.

In determining the scope of magistrate judges' authority under 28 U.S.C. §636, the Court has "interpreted the Federal Magistrates Act in light of its structure and purpose." *Peretz*, 501 U.S., at 930 n.7 (quoting *Gomez v. United States*, 490 U.S. 858, 863-64 (1989) (citing *United*

States v. Raddatz, 447 U.S. 667 (1980), *Mathews v. Weber*, 423 U.S. 261 (1976), and *Wingo v. Wedding*, 418 U.S. 461 (1974))). In addition to using the Act's structure and purpose as guideposts, the Court has construed the Act broadly to "comport[] with the policy behind the Act." *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991).

The structure, purpose, and policy of the Act as a whole—and of §636(c)'s civil-trial-authority provisions in particular—support the validity of post-judgment confirmatory consent. Permitting parties to provide express, post-judgment confirmation of their voluntary decision to proceed before a magistrate judge effectuates parties' expectations, conserves judicial and litigant resources, and furthers Congress's overarching goals of improving judicial efficiency and increasing access to courts through the Federal Magistrates Act.

1. The structure and purpose of the Act reflect Congress's intent to improve judicial efficiency and increase access to courts.

In 1968, Congress passed the Federal Magistrates Act in response to the "ever-growing workload of the U.S. district courts." H.R. REP. NO. 1629, at 4255 (1968); *see also* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968). By creating an "upgraded system of judicial officers below the level of the district judge," Congress hoped to "increas[e] the overall efficiency of the Federal judiciary, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts." H.R. REP. NO. 1629, at 4257.

Since the federal magistrate system's inception in 1968, Congress consistently has amended the Act to expand magistrate judges' authority. In 1976, for example, Congress clarified magistrate judges' authority to conduct evidentiary hearings on habeas corpus petitions. *See* Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified at 28 U.S.C. §636(b)(1)(B)). That amendment was a direct response to *Wingo v. Wedding*, 418 U.S. 461 (1974), in which the Court held that Congress had not authorized magistrate judges to conduct such hearings under the Act. *See* H.R. REP. NO. 94-1609, at 5, 11 (1976); *see also, e.g., Raddatz*, 447 U.S., at 674 (discussing Congress's legislative overruling of *Wingo*); Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 354 (1979) (same). The 1976 amendments also expanded magistrate judges' pretrial authority in other respects, expressly authorizing them to hear and determine non-dispositive matters referred by a district judge and to provide reports and recommendations on case-dispositive motions. *See* Pub. L. No. 94-577, 90 Stat., at 2729 (codified at 28 U.S.C. §636(b)(1)(A)-(C)). By encouraging "innovative experimentations" in the use of magistrate judges, Congress hoped to improve the "efficiency and the quality of justice in the Federal courts." H.R. REP. NO. 94-1609, at 12.

In 1979, Congress added the consensual, case-dispositive-authority provisions of §636(c) to add "flexibility to the Federal judicial system" and to establish "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary." H.R. REP. NO. 96-287, at 2 (1979); McCabe, *supra*, at 343 (quoting H.R. REP. NO. 95-1364, at 5 (1978)). This new "flexible judicial resource" was designed to help district

judges "cope with the vastly varying and ever-changing conditions of the district courts." H.R. REP. NO. 95-1364, at 13.

Additionally, by empowering magistrate judges—with parties' consent—to rule directly on dispositive motions, to conduct trials, and to direct entry of judgments, §636(c) "create[d] a vehicle by which litigants can consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of resolving their civil controversies." H.R. REP. NO. 96-287, at 2; *see also* McCabe, *supra*, at 343 (quoting H.R. REP. NO. 95-1364, at 5). Through this new vehicle, Congress aimed "to improve access to the Federal courts," Pub. L. No. 96-82, 93 Stat., at 643, provide relief to overburdened district judges, and "prevent inattention to a mounting queue of civil cases pushed to the back of the docket." S. REP. NO. 96-74, at 4.[8]

Congress's desire to facilitate §636(c) referrals prompted another round of amendments in 1990. Whereas the 1979 Act had prohibited judges from inquiring whether parties wished to avail themselves of a magistrate judge's civil-trial authority under §636(c), *see* Pub. L. No. 96-82, §2(2), 93 Stat., at 643, the 1990 amendment removed that

[8] The courts of appeals have uniformly upheld the constitutionality of magistrate-judges' §636(c) authority. *See* MAGISTRATE JUDGES DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 148-50 (3d ed. 1999) [hereinafter "INVENTORY OF DUTIES"] (collecting cases). In this case, no party ever questioned the constitutionality of §636(c) in the courts below and, therefore, that issue was not passed upon by the district court or the Fifth Circuit. Nor did the petition for writ of certiorari present this question for the Court's review. *See* Pet. i; Reply to Br. Opp'n 7-9.

communication barrier. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, §308(a)(2), 104 Stat. 5089, 5112 (1990) (codified at 28 U.S.C. §636(c)(2)). Congress amended §636(c)(2) to permit both district judges and magistrate judges to "advise the parties of the availability of the magistrate judge"—provided that judges also "advise the parties that they are free to withhold consent without adverse substantive consequences." *Id.*

The 1990 amendment reflected Congress's increased confidence in magistrate judges' performance and its decreased concern that coercion might infect the voluntary-consent process required to invoke magistrate judges' case-dispositive authority under §636(c). *See* S. REP. NO. 104-366, at 28 (noting, in discussing the 1990 amendment, that "Congress demonstrated that it is comfortable with the quality and competence of magistrate judges and less concerned about coerced consent when it relaxed the provisions of 28 U.S.C. §636(c) governing litigant consent to civil trials by magistrate judges").

The 1990 amendment also reflected Congress's recognition of "[t]he need for the court system to have greater flexibility in utilizing judicial resources." H.R. REP. NO. 101-734, at 27 (1990). As the 1990 House report explained, "[t]his need is particularly acute in handling the expanding civil caseload of federal courts. Liberalizing the civil case consent procedures furthers the goal of efficient and maximum utilization of judicial resources." *Id.* By relaxing the terms of the consent provisions in §636(c), Congress afforded parties greater flexibility in their decisionmaking process and more opportunities to reap the efficiency benefits flowing from magistrate judges' exercise of case-dispositive authority. *See id.*

Congress's effort to build greater flexibility into §636(c)'s consent procedures yielded immediate results. The year before the 1990 amendment, magistrate judges disposed of 5,571 civil cases with the consent of the parties, including 438 jury trials and 581 bench trials. *See* Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1527-28 (1995). After the relaxed consent procedures took effect, those numbers significantly increased. In 1994, for example, magistrate judges handled 7,835 civil-consent cases, including 912 jury trials and 831 bench trials. *Id.*, at 1528.[9]

Magistrate judges not only resolve an increasing number of civil cases, but now also possess contempt powers to further their authority under §636(c). Congress amended §636 in 2000 to allow magistrate judges to punish resistance to orders issued in cases referred pursuant to §636(c). Pub. L. No. 106-518, §202, 114 Stat., at 2412-13 (codified at 28 U.S.C. §636(e)).

Through each of these amendments to the Federal Magistrates Act, Congress bolstered magistrate judges'

[9] In recent years, magistrate judges have shouldered an even heavier civil caseload. In 1999, magistrate judges disposed of 11,320 civil-consent cases (850 jury trials and 648 bench trials); in 2000, that number increased slightly to 11,481 (750 jury trials and 550 bench trials); and, in 2001, civil-consent cases totaled 12,024 (590 jury trials and 489 bench trials). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, tbl. S-17 (2001). Of course, these statistics represent only a fraction of magistrate judges' total duties, which also include, for example, §636(b) referrals. In 2001, magistrate judges handled 873,948 matters in the federal district courts. *See id.*

authority in an effort to assist district courts in managing ever-expanding dockets and to countermand civil backlog that impedes litigants' access to courts. Indeed, this Court's "decisions have continued to acknowledge the importance Congress placed on the magistrate's role." *Peretz*, 501 U.S., at 928. As the Court observed in *Peretz*, "the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who conceived it," with magistrate judges accounting for "a staggering volume of judicial work." *Id.*, at 928 n.5 (citation omitted). "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable." *Id.*, at 928 (citation omitted).

It would compromise magistrate judges' indispensable role—and thwart both Congress's efficiency goals and litigants' expectations—to divest magistrate judges of case-dispositive authority whenever a party voluntarily proceeds under §636(c) but neglects to file written pre-judgment consent. *Cf., e.g., Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 56 (1983) (explaining that statutes should not be interpreted "to produce a result at odds with the purposes underlying the statute" but rather "in a way that will further Congress' overriding objective"). To exalt form over substance and preclude post-judgment confirmatory consent would contravene congressional intent and impede the judicial efficiencies achieved through the enactment and evolution of the Federal Magistrates Act.

2. The purpose of §636(c)'s consent requirement is to prohibit coercive referrals, not impose technical constraints on magistrate judges' civil-trial authority.

In construing §636(c), the Court should look not only to Congress's overarching efficiency and access goals, but also to Congress's intent in conditioning magistrate judges' §636(c) authority on all parties' consent. Because the term "consent" is unaccompanied by explanatory language, the legislative history is particularly relevant. *See, e.g., United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 139 (1989) (considering legislative history and purpose when statutory language was not dispositive). And, as evidenced by the legislative history of the 1979 and 1990 amendments, Congress's purpose in requiring consent was to prevent coercion in §636(c) referrals.

The legislative history of the Federal Magistrate Act of 1979—which established magistrate judges' civil case-dispositive authority—is replete with discussions about the voluntariness of consent, but it specifies no particular form that consent must take. The Joint Explanatory Statement of the Committee of Conference to the House and Senate is particularly instructive:

> "[T]he *voluntary* consent of the parties is required before a civil action may be referred to a magistrate for final decision. . . . The conferees felt that because of the possibility of coercion a strong warning should remain in the legislation that neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference. . . . [R]ules of the court must include procedures to *protect the voluntariness, knowingness, and willingness* of the consent. . . . [O]nce pretrial proceedings have commenced before a district judge or magistrate, the parties could consent to trial by a magistrate before either of these judicial officers. Of course, they also could return to the clerk's office and file their consent there. Again, in this circumstance, no coercion is to be tolerated." S. CONF. REP. NO. 96-322, at 7-8 (1979) (emphasis added).

Other discussions of voluntariness abound. And all focus on preventing coercion, not formalizing consent. *See, e.g.*, S. REP. NO. 96-74, at 5 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates."); H.R. REP. NO. 96-287, at 2 (1979) ("The bill makes clear that the knowing and voluntary consent of the parties is required before any civil action may be referred to a magistrate; no coercion will be tolerated.").

Similarly, the legislative history of the 1990 amendment—which relaxed communication barriers between litigants and judges on the issue of consent—reiterates Congress's concern that consent be voluntary. The House report on the 1990 legislation, for example, notes that pre-1990 consent procedures—under which "judicial officers may not attempt to persuade or induce any party to consent to reference of a civil matter to a magistrate"—too often left litigants uninformed about the option of proceeding before a magistrate judge and "effectively frustrated the intent of the 1979 amendments to the Federal Magistrates Act which authorized magistrates to try civil consent cases." H.R. REP. NO. 101-734, at 27. In response, the 1990 amendment balanced the need to protect the voluntariness

of litigants' consent with the need to facilitate the exercise of magistrate judges' case-dispositive authority:

> "The right of a litigant to have his case heard by an Article III judge remains paramount. Under the present Act, judicial officers are restricted from informing parties of their opportunity to have a civil matter referred to a magistrate because of concerns that judges would coerce parties to accept a reference to a magistrate. Those concerns have not been borne out in the decade since the 1979 revisions. The amendment safeguards the right of a civil litigant to trail [*sic*] by an Article III judge by requiring judges and magistrates to advise parties of their freedom to withhold consent to magistrate jurisdiction without fear of adverse consequences. The amendment thus provides a proper balance between increased judicial flexibility and continued protection of litigants from possible undue coercion." *Id.*

Had Congress been concerned about the formalities of consent it could have amended the Act to require parties to execute written, pre-judgment consent as a precondition to magistrate judges' case-dispositive authority. But Congress did not. *See supra* Part I.A. Instead, the 1990 amendment took the opposite approach, "[l]iberalizing the civil case consent procedures" to "further[ ] the goal of efficient and maximum utilization of judicial resources." H.R. REP. NO. 101-734, at 27.

3. The Court should construe §636(c)'s consent requirement broadly to comport with the policy behind the Federal Magistrates Act.

In construing other provisions of 28 U.S.C. §636, the Court has interpreted the statute to "comport[ ] with the policy behind the Act." *McCarthy*, 500 U.S., at 142. In *McCarthy*, for example, the Court broadly construed 28 U.S.C. §636(b)(1)(B), which authorizes magistrate judges to conduct preliminary assessments of prisoner suits challenging "conditions of confinement." *Id.*, at 142-44. In interpreting the statutory phrase "conditions of confinement" to include not only systemic complaints, but also single-episode incidents, the Court noted that its reading would enable district courts to refer a greater number of prisoner suits to magistrate judges. *Id.*, at 142-43. Emphasizing that Congress's "central purpose" in enacting §636(b)(1)(B) was "to authorize greater use of magistrates to assist federal judges 'in handling an ever-increasing caseload,'" *id.*, at 142 (quoting S. REP. NO. 94-625, at 2 (1976)), the Court explained that broad construction of §636(b)(1)(B) was consistent with congressional intent "because it will allow referral of a broader category of cases." *Id.*, at 143.

Similarly, in *Peretz*, the Court adopted a broad construction of §636(b) in furtherance of the policy behind the Federal Magistrates Act. 501 U.S, at 933-34. Specifically, the Court held that the "additional duties" clause of §636(b)(3) permits magistrate judges to conduct felony *voir dire* with a defendant's consent. *Id.*, at 934. In reaching this conclusion, the Court noted that its reading of the statute "will permit the courts, with the litigants' consent, to 'continue innovative experimentations' in the use of

magistrates to improve the efficient administration of the courts' dockets." *Id.*

In construing §636(c), the Court should look not only to the policy behind the Act as a whole, but also to the policies underlying that section in particular. The evolution of §636(c) confirms Congress's intent to promote judicial efficiency by increasing the flexibility of §636(c) consent procedures. *See, e.g.*, H.R. REP. NO. 101-734, at 27; H.R. REP. NO. 96-287, at 2 (1979); H.R. REP. NO. 95-1364, at 13; McCabe, *supra*, at 343. Because "[l]iberalizing the civil case consent procedures furthers the goal of efficient and maximum utilization of judicial resources," *id.*, the requirements of §636(c) should be construed broadly to further that policy choice.[10]

[10] A broad construction of consent also would accommodate variations in local rules implementing §636(c)—an aspect of the referral process that Congress instructed district courts to administer. *See* 28 U.S.C. §636(c)(2) (requiring that local procedures guard against coercion); *see also* S. REP. NO. 96-74, at 14. All district courts now designate full-time magistrate judges to exercise civil-consent authority pursuant to §636(c). INVENTORY OF DUTIES, *supra*, at 141. And, due to the statute's inherent flexibility, courts employ a wide array of referral procedures. *See, e.g.*, C.D. CAL. R. 6.6.3 (requiring filed consent at least thirty days before final pretrial conference unless district court approves later consent); D. COLO. R. 72.2(D) (requiring filing of written consent within ten days after discovery cut-off or forty days after last-filed pleading in non-discovery cases); D.D.C. R. 73.1(b) (requiring filing of signed notice of consent prior to entry of a pretrial order); D. OR. R. 72.1 advisory note 1 (including magistrate judges in random assignments of all civil filings); N.D. ALA. R. 73.2(c) (assigning case to magistrate judge if parties consent within ninety days after case is filed); *see generally* MAGISTRATE JUDGES DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY 1-3 (June 2002) (reviewing variations in district courts' direct-referral practices, under which cases are assigned to magistrate judges prior to parties' consent) [hereinafter "FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY"].

Permitting post-judgment consent is consistent with Congress's policy choice in §636(c). By contrast, construing the statute to preclude post-judgment consent impedes Congress's efficiency and access goals—squandering judicial and litigant resources expended on a trial that now must be duplicated because of a technical defect in the form of two defendants' consent. *See* Pet App. 10a (requiring that "this matter be re-tried at the expense of the parties and the judicial system").

Previously, the Court has rejected constructions of the Act that undermine Congress's objectives. In *McCarthy*, for example, the Court declined to adopt a reading of the Act that would have multiplied proceedings and "generate[d] additional work for the district courts." 500 U.S., at 143 (determining that a narrow construction of the term "conditions of confinement" in §636(b)(1)(B) would prompt new litigation over which prisoner suits qualified for

Under varying local procedures, missteps are inevitable, as occurred in this case. Withrow failed to secure all parties' consent, which is a responsibility assigned to plaintiffs under the Southern District of Texas's local rules. *See* S.D. TEX. GEN. ORDER No. 80-5 art. III.B.2. (Br. Opp'n App. 7a); *see also* S.D. TEX. GEN. ORDER NO. 2001-6 art. III.B. Additionally, Defendants Roell and Garibay neglected to sign locally prescribed consent forms. S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2. Finally, the district judge departed from local practice by referring the case before any defendants had been served, much less consented. *See id.* art. III.B.3. These technical defects in local procedures, however, did not negate the reality of the parties' voluntary decision to proceed before the magistrate judge. And, it is that voluntary decision that triggers a magistrate judge's authority under §636(c). *See* 28 U.S.C. §636(c)(1). The Court should construe §636(c) in a manner that is consistent with the statutory design, linking magistrate judges' authority to the voluntariness of consent, *see* 28 U.S.C. §636(c)(1), while treating the formalities of consent as a local, administrative issue to be determined by district courts. *See id.* §636(c)(2).

referral under that provision). In *United States v. Raddatz*, as well, the Court rejected a construction of the Act that "would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts." 447 U.S. 667, 676 n.3 (1980) (declining to construe §636(b)(1) to require district judges to re-hear evidence offered at a suppression hearing conducted by a magistrate judge).

The Court similarly should reject a hypertechnical view of §636(c) that would increase civil backlog and unnecessarily generate additional work for federal courts by voiding final judgments and jury verdicts whenever a party neglects to file express pretrial consent. *See McCarthy*, 500 U.S., at 142; *Raddatz*, 447 U.S., at 676. Because such an approach is neither required by §636(c)'s plain terms, nor consistent with the policy behind the Federal Magistrates Act, the Court should hold, instead, that parties may cure technical defects in §636(c) referrals by providing post-judgment confirmation of their pretrial consent.

C. Post-Judgment Confirmatory Consent Satisfies §636(c)'s Voluntariness Requirement and Furthers the Federal Magistrates Act's Access and Efficiency Goals.

Rather than utilize the established guideposts of structure, purpose, and policy in construing the Federal Magistrates Act, *see supra* Part I.B, the Fifth Circuit based its construction of §636(c) on two unwarranted assumptions that are unrelated to congressional intent: first, that post-judgment consent impermissibly implies consent from a party's conduct; and, second, that defining consent solely by *pretrial* statements eliminates "gamesmanship." Pet.

App. 8a-10a. The Fifth Circuit, however, was mistaken on both counts. Moreover, these misconceptions yielded a construction of §636(c) that is inconsistent with Congress's objectives.

In providing magistrate judges with consensual, case-dispositive authority, Congress sought to ensure the voluntariness of parties' consent while also facilitating referrals under §636(c). *See supra* Part I.B. Section 636(c) should be interpreted in light of these two goals because, as in all statutory-construction cases, congressional intent is paramount. *See Chickasaw Nation v. United States*, 534 U.S. 84, ___, 122 S.Ct. 528, 535 (2001).

1. In construing §636(c), the Court should not ignore the practical realities of district-court proceedings that reflect parties' voluntary consent.

When, as in this case, all parties are fully informed that the magistrate judge intends to exercise case-dispositive authority—and the parties voluntarily proceed before the magistrate judge with the knowledge and expectation that she can rule on dispositive motions, conduct trial, and direct entry of a final judgment—the magistrate judge acts "upon the consent of the parties" in accordance with §636(c). 28 U.S.C. §636(c).

The "upon the consent of the parties" language in §636(c) does not require an immediate, written expression of consent. *See King*, 825 F.2d, at 1185 (noting that while some courts insist on "a clear statement by the parties,"

that requirement is "without basis in the statute").[11] Rather, that language prohibits referrals to magistrate judges against the parties' wishes.

No party, including Withrow, has ever maintained that the referral of this case to the magistrate judge was against the parties' wishes. Nor has any party denied consenting to the magistrate judge's authority or suggested that consent was coerced. And the record contains no indication that each party's decision to proceed before the magistrate judge was not voluntarily made.

Although Defendants Roell and Garibay did not expressly confirm consent until after judgment, Pet. App. 22a, that does not mean they did not previously consent to proceed before the magistrate judge—to whom the case already was referred at the time of service. Pet. App. 21a. To the contrary, the magistrate judge noted, on remand from the Fifth Circuit, that these defendants "by their actions . . . clearly implied their consent to the jurisdiction of a magistrate." Pet. App. 19a.

[11] Federal Rule of Civil Procedure 73, which complements §636(c), instructs parties to file consent forms with the district-court clerk. FED. R. CIV. P. 73; *see also id.* Form 34. But a magistrate judge's civil-trial authority derives from the statute, *see* 28 U.S.C. §636(c), not this rule. Thus, many courts, including the Fifth Circuit, have not enforced strict compliance with the rule when the record otherwise documents consent. *See, e.g., Kofoed*, 237 F.3d, at 1004 (referencing Rule 73 but deeming adequate pre-judgment oral consent confirmed by post-judgment written consent); *Kadonsky v. United States*, 216 F.3d 499, 502 (CA5 2000) (accepting consent of party who did not sign the form officially recognized by Rule 73 because "he did sign a document evincing his willingness to proceed before a magistrate judge"), *cert. denied*, 531 U.S. 1176 (2001); *Silberstein v. Silberstein*, 859 F.2d 40, 43 (CA7 1988) (referencing Form 34 and expressing a preference for, but not requiring, written consent). *But see N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 23-24 (CA 1993) (emphasizing Rule 73's literal requirements). The Judicial Conference Committee on the Administration of the Magistrate Judges System has suggested that Rule 73 be amended to eliminate the written consent requirement. *See* COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES 4 (1993 & Supp. 1994) [hereinafter "LONG RANGE PLAN"].

Under these circumstances, when no party claims coercion and the record evidences only indicia of consent, it is consistent with §636(c)'s voluntariness requirement to infer consent from the proceedings below—particularly when, as here, the record also contains each party's pre- or post-judgment express consent. *Cf. Archie v. Christian*, 808 F.2d 1132, 1137 (CA5 1987) (en banc) (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceeded to trial before a magistrate judge but failed to execute written consent, and "no parties objected to the magistrate's having presided over the trial, although they were well aware that a magistrate had presided. . . . [i]n every real sense they consented").

2. Post-judgment consent is a type of express consent that satisfies §636(c).

In addition to evidencing consent through their actions in the district court, all parties in this case provided express, written consent to the magistrate judge's authority—whether pre-trial (Withrow and Defendant Reagan) or post-judgment (Defendants Roell and Garibay). Pet. App. 20a, 22a; J.A. 2; *see Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (CA7 1995) (recognizing that even "[a] late-submitted consent is 'an unequivocal representation that the magistrate was acting with the parties'

consent'") (citation omitted). There was no need to imply consent from any of the parties' conduct, as the Fifth Circuit erroneously reasoned, because the record contained express statements of each party's agreement to proceed before the magistrate judge.

Assuming, *arguendo*, that implied consent is inconsistent with §636(c),[12] that reading of the statute does not

[12] Courts generally have agreed with the Fifth Circuit's view that consent under §636(c) must be express, not implied. *See, e.g., Kofoed*, 237 F.3d, at 1004; *Rembert v. Apfel*, 213 F.3d 1331, 1334 (CA11 2000); *N.Y. Chinese TV Programs*, 996 F.2d, at 24; *King*, 825 F.2d, at 1185; *Ambrose v. Welch*, 729 F.2d 1084, 1085 (CA6 1984) (per curiam). Notwithstanding such aversion to implied consent, the Judicial Conference Committee on the Administration of the Magistrate Judges System has endorsed "opt out" systems in which cases are randomly referred to magistrate judges and a party must expressly object to the referral if they wish to proceed instead before an Article III judge. LONG RANGE PLAN, *supra*, at 3-4. In practice, many district courts now assign cases directly to magistrate judges on a random basis, and the magistrate judges retain those cases unless the parties do not consent. *See* FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY, *supra*, at 1 (noting that at least twenty-two districts have added magistrate judges to the "draw" or "wheel" for assignment of civil cases).

Because §636(c) demands only that consent be voluntary, such opt-out and automatic-referral procedures are not inherently inconsistent with the statute or with Congress's intent—provided parties truly have a meaningful opportunity to object. *See* H.R. REP. NO. 101-734, at 27 (balancing the need to ensure the voluntariness of a party's decision to waive their right to an Article III judge with the need to facilitate civil referrals). If a case is referred to a magistrate judge with the parties' full knowledge that the referral encompasses trial and entry of judgment—and the parties voluntarily proceed without objection and without demanding that the case be heard by an Article III judge—the magistrate judge acts, for all practical purposes, with the parties' consent. *Cf. Peretz*, 501 U.S., at 936-37 (holding that a criminal defendant who fails to object to a magistrate judge conducting felony *voir dire* under §636(b)(3) waives the right to demand the presence of an Article III district judge at the selection of his jury); *cf. also*

preclude post-judgment consent. For example, the Seventh Circuit—like the Fifth Circuit—rejects implied consent under §636(c); but that court correctly recognizes that express post-judgment consent is not "implied." *King*, 825 F.2d, at 1185 (recognizing that "while many courts (including our own) refuse to infer consent from the parties' behavior, and some have even insisted (without basis in the statute) on 'a clear statement by the parties,'" post-judgment consent "*is* a clear statement by the parties" that satisfies those concerns) (citations omitted).

Post-judgment consent may confirm what previously was implicit in a party's conduct, but that does not render it implied consent. *See id.* Rather, it is an express statement of the voluntary consent that preceded entry of judgment but was never articulated on the record.

Post-judgment confirmatory consent satisfies §636(c)'s voluntariness requirements because it rests on two consistent demonstrations of consent: first, an express post-judgment statement; and, second, pre-judgment conduct that clearly evidences consent. In combination, these two forms of consent unambiguously establish a magistrate

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849-50 (1986) (noting that party's decision to proceed before the commission rather than pursue relief in state or federal court "constituted an effective waiver" of any right to trial before an Article III court on a counterclaim). Of course, even under an inferred-consent rule, parties could dispute consent and argue that whatever manifestations of consent appear on the record resulted from coercion, not a voluntary agreement to proceed before the magistrate judge. Regardless, in this case the Court need not decide whether opt-out procedures, random case assignments, or inferred consent satisfy §636(c) because all parties expressed their consent on the record—either pretrial or post-judgment.

judge's authority to preside over a civil trial and to direct entry of judgment.

In this case, the written, post-judgment consent filed in the district court by Defendants Roell, Garibay, and Reagan not only was consistent with their consensual conduct before the magistrate judge, but also was an unequivocal declaration of express consent:

> "Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." Pet. App. 22a.

This express statement unconditionally confirmed these defendants' consent to proceed before the magistrate judge in accordance with §636(c), and it should have settled any question of the magistrate judge's authority to enter final judgment.

3. Congressional intent, not game theory, should guide the Court's construction of §636(c).

Under the Fifth Circuit's analysis of §636(c), speculation about litigant manipulation replaced congressional intent as a defining principle in construing the statute. Pet. App. 9a-10a. Game theory, however, is not a reliable statutory-construction tool.

Requiring pretrial consent does not eliminate gamesmanship, as the Fifth Circuit erroneously reasoned. *Id.* The potential for "strategy games" exists under any consent rule. *Smith*, 60 F.3d, at 321. If courts "did not accept late consents," for example, "a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost." *Id.*[13]

Indeed, the Fifth Circuit has encountered such strategic maneuvers. In *Caprera v. Jacobs*, 790 F.2d 442 (CA5 1986) (per curiam), the court reluctantly vacated a magistrate judge's dismissal of plaintiffs' §1983 suit when all original parties consented to the magistrate judge's civil-trial authority but a defendant added by plaintiffs in an amended complaint neglected to file a form. After the magistrate judge granted defendants' Rule 12(b)(6) motion and dismissed plaintiffs' claims, the plaintiffs protested his authority, citing the added defendant's failure to file written consent. As the Fifth Circuit bemoaned:

> "We recognize that it is unfair to allow a party, as the plaintiffs did here, to remain silent on the jurisdictional problem while awaiting the magistrate's decision, knowing it will get a second chance from the appellate court should the magistrate rule against the party. This court does not favor giving such parties 'a second bite at the

[13] An "inferred consent" rule based on parties' conduct presumably would eliminate gamesmanship because parties could no longer withhold express consent, voluntarily proceed to trial before a magistrate judge, and then determine whether to consent post-judgment depending on the outcome of the case. It would be more protective of Congress's voluntariness concerns, however, to require parties to expressly confirm their consent—either pretrial or post-judgment.

apple.' However, when the objection is to jurisdiction, it cannot be waived." *Id.*, at 445 (citations omitted).[14]

Whether a court allows post-judgment consent or limits consent to pretrial statements, opportunities will exist for litigants to game the magistrate-judge system. Rather than "write a treatise on game theory," *Smith*, 60 F.3d, at 321, the Court should apply established statutory-construction principles and construe §636(c) in light of the structure, purpose, and policy behind the Federal Magistrates Act. *See Peretz*, 501 U.S., at 930 n.7; *McCarthy*, 500 U.S., at 142. And, under this framework, Congress's efficiency and access goals militate in favor of a broad construction of §636(c) that permits post-judgment consent. *See supra* Part I.B.

II. SECTION 636(C) NEITHER IMPLICATES SUBJECT-MATTER JURISDICTION NOR REQUIRES APPELLATE COURTS TO NULLIFY JUDGMENTS, *SUA SPONTE*, FOR LACK OF CONSENT.

At the time Withrow appealed the adverse jury verdict and judgment, no party disputed the existence of consent. Yet the Fifth Circuit raised the issue *sua sponte*—prompted by its misunderstanding of the role consent plays in a §636(c) referral: "When the magistrate judge

[14] Technical defects in consensual referrals implicate a magistrate judge's authority, not the subject-matter jurisdiction of the district court. *See infra* Part II. The *Caprera* plaintiffs objected to the magistrate judge's authority post-judgment, both in a Rule 60(b) motion and on appeal, placing the issue of consent squarely before the Fifth Circuit. But when, as in this case, no party contests consent, an appellate court should not raise the issue *sua sponte*. *See id.*

enters final judgment in a suit pursuant to 28 U.S.C. §636(c), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived." Pet. App. 12a-13a.

The absence of §636(c) consent, however, does not equate with a lack of subject-matter jurisdiction—which does require *sua sponte* consideration. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). Consent is a predicate for the exercise of civil-trial authority under §636(c), but it does not provide a basis for subject-matter jurisdiction in the district court. Accordingly, any defect in a §636(c) referral is not a jurisdictional error requiring *sua sponte* investigation, and an appellate court should not question consent—and unnecessarily overturn jury verdicts and final judgments—when no party protests that the magistrate judge proceeded without that party's consent.

A. Consensual Referrals Under §636(c) Do Not Implicate Subject-Matter Jurisdiction.

The trial court's subject-matter jurisdiction in this case was premised on federal-question jurisdiction, *see* 28 U.S.C. §1331, not any provision of the Federal Magistrates Act. The Fifth Circuit's identification of an irregularity in the statutory-referral procedure did not—and could not—nullify the federal question that conferred subject-matter jurisdiction over Withrow's §1983 suit.

In *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, Justice Kennedy—then writing for the Ninth Circuit en banc court—recognized the distinction between subject-matter jurisdiction and §636(c) consent.

725 F.2d 537, 543 (CA9 1984) (en banc). As Justice Kennedy explained, parties who invoke a magistrate judge's authority under §636(c) consent to waive the right to proceed before an Article III judge. *See id.* But they do not consent to subject-matter jurisdiction—which cannot be conferred by agreement. *See id.* (explaining that jurisdiction emanates from the subject matter of the suit, not parties' consent pursuant to §636(c)). And just as consent under §636(c) cannot create jurisdiction that does not otherwise exist, *see id.*, nor can the absence of consent destroy jurisdiction that independently stems from a federal question in the suit. *See* 28 U.S.C. §1331; *see also Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041-42 (CA7 1984) (clarifying that a §636(c) consensual referral "is not an expansion of the subject matter jurisdiction of the federal courts but rather the parties' choice of the forum in which the suit, for which federal jurisdiction clearly exists, is to be litigated"); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (CA3 1983) (concluding that consent issues under §636(c) relate "not to the jurisdiction of the district court as an entity, but to the judicial officer within the court who conducted the trial").

Although this Court previously has described magistrate judges' authority under §636(c) in terms of "expanded jurisdiction," it did so while discussing the scope of statutorily authorized duties, not *subject-matter* jurisdiction. *Gomez*, 490 U.S., at 870 (contrasting Congress's explicit grant of consensual civil-trial authority under §636(c) with delegation of felony-trial duties under §636(b)(3)). Similarly, while the word "jurisdiction" appears in §636's caption—"Jurisdiction, powers, and temporary assignment"—the statute's provisions address magistrate judges' authority, not subject-matter jurisdiction. *See* 28 U.S.C.

§636. Such uses of the word "jurisdiction" are not surprising because, as Justice Scalia has observed, "'jurisdiction' . . . is a many-hued term":

> "[The Court] used it in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act." *Peretz*, 501 U.S. at 953 (Scalia, J., dissenting) (citation omitted).[15]

Although *Peretz* involved the delegation of *voir dire* supervision in a felony trial pursuant to §636(b)(3), not a referral to a magistrate judge for trial and entry of judgment pursuant to §636(c), Justice Scalia's reasoning resonates in both contexts. Even under a §636(c) referral, the judgment entered "is the judgment of the District Court," *id.*, because "the jurisdiction exercised by magistrates at trial is clearly that of the Article III federal district court." D.O.J. Report, *supra*, at 375; *1979 House Hearings*, *supra*, at 385 (Judicial Conf. of the U.S., Comm. on the Admin. of the Fed. Magistrate Sys. (Jan. 30-31, 1978), Comments on S. 1613—The Magistrate Act of 1977) [hereinafter "Judicial Conf. Comments"] (same); *see also* INVENTORY OF DUTIES, *supra*, at 1; *cf.* 28 U.S.C. §636(c)(1)

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[15] Justice Scalia's dissent was the only opinion in *Peretz* to discuss the distinction between statutory authority and subject-matter jurisdiction—an analysis the majority did not disclaim.

(indicating that a magistrate judge exercising consensual civil-trial authority is an instrument of the district court "he serves").[16]

When Congress expanded magistrate judges' authority by enacting §636(c)'s civil-trial provisions in 1979, Congress understood that it was not remodeling subject-matter jurisdiction. *See* McCabe, *supra*, at 369 (documenting that in passing the 1979 Act, "Congress concluded that the jurisdiction exercised by the magistrate is the jurisdiction of the district court itself"). As a Department of Justice report submitted to Congress explained, "[i]t is the court, not the judge, to which these doctrines of subject-matter jurisdiction apply":

> "The magistrate exercises no independent jurisdiction. . . . The magistrate exercises only that subject-matter jurisdiction which is authorized by the Constitution, delegated to the district court by Act of Congress, and designated by the court itself to be available through its magistrate with the consent of the parties. . . . Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration in trial procedure, not to a transfer of jurisdiction from the district court to another tribunal." D.O.J. Report, *supra*, at 376 (citation omitted).

[16] Drawing on Justice Scalia's reasoning in *Peretz*, the Tenth Circuit has correctly recognized that defects in statutory referral procedures under §636 are not jurisdictional errors. *See Clark v. Poulton*, 963 F.2d 1361, 1367 (CA10 1992) (citing *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting)); *see also In re Griego*, 64 F.3d 580, 583 (CA10 1995). Although these decisions concerned defects in §636(b) referrals—pursuant to which a district-court judge enters final judgment—the Tenth Circuit's reasoning did not depend on that distinction. *See Clark*, 963 F.2d, at 1363-64, 1366-67 (reviewing the statutory structure of §636 as a whole before distinguishing a magistrate judge's statutory authority from subject-matter jurisdiction). Moreover, the Tenth Circuit's approach is consistent with other circuits' distinctions between subject-matter jurisdiction and statutory consent requirements under §636(c). *See Geras*, 742 F.2d, at 1041-42; *Pacemaker*, 725 F.2d, at 543; *Wharton-Thomas*, 721 F.2d, at 929-30.

Other contemporaneous congressional sources echo this understanding that subject-matter jurisdiction resides in the district court and is merely exercised by a magistrate judge. *See* H.R. REP. NO. 96-287, at 8 ("[T]he magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate."); Judicial Conf. Comments, *supra*, at 385 (same); *see also* McCabe, *supra*, at 369 (chronicling legislative discussions of jurisdiction while considering the 1979 Act).

Accordingly, when consent to trial before a magistrate judge is invalid, the only risk it poses is "to the authority of the court or the rights of the litigants"—not subject-matter jurisdiction. D.O.J. Report, *supra*, at 376. The Fifth Circuit's contrary view, which equates lack of §636(c) consent with lack of subject-matter jurisdiction, fundamentally misunderstands the relationship between the magistrate judge and the district court. Because §636(c)'s consent requirements implicate a personal right that parties can waive—not a jurisdictional constraint on the district court—appellate courts should not question

consent, *sua sponte*, when all parties proceed in a manner consistent with consent and also expressly confirm their consent either pretrial or post-judgment. *See Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceed to trial before a magistrate judge but fail to execute written consent, "I would neither find this violation of the rule to be 'jurisdictional' and not waivable, nor so substantial that we ought to consider it, *sua sponte*").

B. Appellate Courts Should Not Vacate Final Judgments Based on Referral Defects to Which No Party Objects.

Because a jurisdictional approach to consent is not required by §636(c), the Fifth Circuit had no basis to vacate the final judgment and void the jury verdict. Yet the Fifth Circuit took that unwarranted action—squandering judicial and litigant resources when no party claimed the magistrate judge proceeded without that party's consent.

The Fifth Circuit's mischaracterization of a referral defect as a fatal jurisdictional flaw provides litigants like Withrow a litigation windfall. Withrow expressly consented to the magistrate judge's authority, never alleged lack of consent by defendants, and proceeded to try his case to a jury that found against him. The Fifth Circuit's jurisdictional recasting of consent, however, extends Withrow a second bite at the apple. That result—which unjustly subjects the parties and district court to the burdens of a new trial—should not stand. *See Peretz*, 501 U.S., at 935 & n.12 (explaining that a defendant may consent to a magistrate judge's authority to conduct *voir dire* in a felony case and that "defendants may waive the

right to a judicial performance of other important functions, including the conduct of the trial itself in misdemeanor and civil proceedings"); *cf. McDowell v. United States*, 159 U.S. 596, 598-602 (1895) (holding that any defect in statutorily authorized intracircuit judicial assignment was immunized by the *de facto* officer doctrine); *Ball v. United States*, 140 U.S. 118, 128 (1891) (determining that irregularity in the temporary appointment of district judge to particular district did not subject the judge's acts to collateral attack).

Any irregularity in the referral of this case to the magistrate judge did not deprive the district court of its subject-matter jurisdiction over Withrow's suit; and it should not have spurred a *sua sponte* inquiry by the appellate court. Under no circumstances, moreover, did the alleged consent defect require "that this matter be retried at the expense of the parties and the judicial system." Pet. App. 10a.[17]

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[17] Other courts have examined consent *sua sponte* but framed the inquiry in terms of their own appellate jurisdiction, not the subject-matter jurisdiction of the district court. *See* 28 U.S.C. §1291. These courts conclude that, absent consent, the magistrate judge had no authority to enter a final judgment; therefore, no reviewable order exists on appeal. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001); *Kofoed*, 237 F.3d, at 1003-04. This justification for *sua sponte* consideration is also flawed. When a party appeals a judgment rendered by a magistrate judge pursuant to §636(c), that party brings a valid judgment within the meaning of §1291 to the court of appeals. *See* 28 U.S.C. §636(c)(1), (3). A magistrate judge's signature on that document should not render the judgment suspect or provoke doubts about appellate jurisdiction as might arise, for example, in an appeal from an interlocutory order. When a final judgment facially satisfies §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court.

The Fifth Circuit's *sua sponte* investigation of consent furthered no jurisdictional interest, nor any voluntariness concerns under §636(c). Because all parties voluntarily proceeded before the magistrate judge, who exercised the federal-question jurisdiction of the district court, the final judgment was valid and entitled to respect on appeal. *See* 28 U.S.C. §636(c)(1), (3).

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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December 19, 2002

UNITED STATES CODE
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART III—COURT OFFICERS AND EMPLOYEES
CHAPTER 43—UNITED STATES MAGISTRATE JUDGES

§636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for

summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial[1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is

[1] So in original. Probably should be "post-trial".

made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1)

and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.—

(1) In general.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.—A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish,

by fine or imprisonment, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.—The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.—Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.—The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance

with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.

Supreme Court, U.S.
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No. 02-69

IN THE

Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the court of appeals correctly vacate a final judgment entered by a magistrate judge on the ground that two defendants did not consent to the referral to the magistrate judge prior to trial, as required by both the Federal Magistrates Act, 28 U.S.C. § 636(c)(1), and the local rules of the district court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
A. Statutory Background	2
B. Factual Background	4
C. Post-Trial Proceedings	7
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE FEDERAL MAGISTRATES ACT REQUIRES CONSENT OF ALL PARTIES BEFORE A MAGISTRATE JUDGE MAY PRESIDE AT TRIAL AND ENTER JUDGMENT	11
A. Section 636(c) Mandates Unambiguous Pretrial Consent	11
1. All Parties Must Consent Before Trial Begins	11
2. Silence Is Not Consent	14
B. The Legislative History And Purpose Of The Federal Magistrates Act Confirm That Consent Must Precede Trial And Judgment	18
C. Interpreting The Federal Magistrates Act To Permit Post-Judgment Consent Would Violate The Doctrine Of Constitutional Avoidance	21

TABLE OF CONTENTS—Continued

	Page
II. DEFENDANTS' PRETRIAL SILENCE WAS NOT CONSENT	24
III. THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE FIFTH CIRCUIT'S JUDGMENT	26
IV. THE FIFTH CIRCUIT PROPERLY RAISED THE ISSUE OF CONSENT *SUA SPONTE*	28
CONCLUSION	34
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Pages
Ambrose v. Welch, 729 F.2d 1084 (6th Cir. 1984)	14
American Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381 (7th Cir. 1995)	21, 32
Arcadia v. Ohio Power Co., 498 U.S. 73 (1990)	28
Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987)	25
Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)	15
Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985)	24
Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986)	30
Blum v. Bacon, 457 U.S. 132 (1982)	28
Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001)	17
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)	22, 23
Demarest v. Manspeaker, 498 U.S. 184 (1991)	29
Drake v. Minnesota Mining & Mfg Co., 134 F.3d 878 (7th Cir. 1998)	21
EEOC v. West La. Health Servs., Inc., 959 F.2d 1277 (5th Cir. 1992)	29
Frad v. Kelly, 302 U.S. 312 (1937)	30
General Trading Inc., v. Yale Materials Handling Corp., 119 F.3d 1485 (11th Cir. 1997)	21
Glidden Co. v. Zdanok, 370 U.S. 530 (1962)	31
Glover v. Alabama Bd. of Corrections, 660 F.2d 120 (5th Cir. 1981)	14, 22
Gomez v. United States, 490 U.S. 858 (1989)	22, 23, 31
Hajek v. Burlington N. R.R. Co., 186 F.3d 1105 (9th Cir. 1999)	15, 32

TABLE OF AUTHORITIES—Continued

	Pages
King v. Ionization Int'l, 825 F.2d 1180 (7th Cir. 1987)	21
Mark I, Inc. v. Gruber, 38 F.3d 369 (7th Cir. 1994)	14, 19
Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996)	29
McGinnis v. Shalala, 2 F.3d 548 (5th Cir. 1993)	25
McNab v. J. & J. Marine, Inc., 240 F.3d 1326 (11th Cir. 2001)	32
Mendes Jr. Int'l Co. v. M/V Sokai Maru, 978 F.2d 920 (5th Cir. 1992)	29
Mitchell v. Maurer, 293 U.S. 237, 244 (1934)	30
Nasca v. Peoplesoft, 160 F.3d 578 (9th Cir. 1998)	14
New Hampshire v. Maine, 532 U.S. 742 (2001)	29
New York Chinese TV Programs, Inc. v. U.E. Enters., Inc., 996 F.2d 21 (2d Cir. 1993)	14, 32
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	22, 24
Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix Inc., 725 F.2d 537 (9th Cir. 1984)	11, 23
Peretz v. United States, 501 U.S. 923 (1991)	22, 23, 24
Rembert v. Apfel, 213 F.3d 1331 (11th Cir. 2000)	14, 15
Silber v. United States, 370 U.S. 717 (1962)	33
Smith v. Shawnee Library Sys., 60 F.3d 317 (7th Cir. 1995)	20, 21
Sorenson v. Secretary of the Treasury, 475 U.S. 851 (1986)	12
Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985)	5
Teague v. Lane, 489 U.S. 288 (1989)	28

TABLE OF AUTHORITIES—Continued

	Pages
Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 791 (1989)	17
Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983)	11, 24
Wingo v. Wedding, 418 U.S. 461 (1974)	31
Withrow v. Roell, 288 F.3d 199 (5th Cir. 2002)	8
STATUTES	
28 U.S.C. §636	*passim*
28 U.S.C. §636(b)	25
28 U.S.C. §636(c)	*passim*
28 U.S.C. §636(c)(1)	*passim*
28 U.S.C. §636(c)(2)	2, 12, 16, 26, 32
28 U.S.C. §636(c)(3)	32
28 U.S.C. §636(e)(3)	12, 13
28 U.S.C. §636(h)	11, 12, 16
28 U.S.C. §1291	33
42 U.S.C. §1983	5
RULES	
Fed. R. Civ. P. 73(b)	*passim*
Fed. R. Civ. P. 83(a)(1)	26
Fed. R. Civ. P. Appendix of Forms, Form 34	3
Advisory Committee Note to Fed. R. Civ. P. 73(b)	27
D. N.H. LR 73.1(b)(2)(B)	15, 20
OTHER AUTHORITIES	
Black's Law Dictionary (7th ed. 1999)	14
The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643	13
H.R. Conf. Rep. 96-444	11, 18
H.R. Rep. No. 90-1629 (1968)	19

TABLE OF AUTHORITIES—Continued

	Pages
H.R. Rep. No. 96-287 (1979)	13
R. Stern, et al., Supreme Court Practice (8th ed. 2002)	28
S. Conf. Rep. No. 96-322 (1979)	11, 18, 26
S. Rep. No. 96-74 (1979)	11, 18, 19, 32
Magistrate Judges Division of the Administrative Office of the United States Courts, "A Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. 247 (1993)	15, 22, 23
Peter G. McCabe, "The Federal Magistrate Act of 1979," 16 Harv. J. Legis. 343 (1979)	14
Note, "Masters and Magistrates in the Federal Courts," 88 Harv. L. Rev. 779 (1975)	22
Webster's New Collegiate Dictionary (1977)	11

IN THE

Supreme Court of the United States

No. 02-69

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

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JON MICHAEL WITHROW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

The issue in this case is whether the Federal Magistrates Act requires parties to consent before a magistrate judge presides at trial and enters judgment, as respondent Jon Michael Withrow argues, or permits post-judgment consent, as petitioners contend. The text of the Magistrates Act states that all parties must consent before a magistrate exercises case-dispositive authority, and the legislative history confirms that Congress intended the parties to consent prior to trial. And for good reason. Under a post-judgment consent rule, parties have an incentive to withhold consent, await the outcome of trial, and then consent only if they prevail. If, on the other hand, a non-consenting party lost, that party could then refuse to consent and demand a retrial, thereby delaying the administration of justice, wasting judicial resources, and increasing the workload of Article III judges—undermining Congress' purpose in enacting the Magistrates Act. Moreover, petitioners' "heads I win, tails you lose" proposition is unfair to litigants, such as Withrow,

who consent before trial and thus, in petitioners' view, are locked into the final result even though their opponents are free to demand a new trial.

STATEMENT OF THE CASE

A. Statutory Background

In 1979, the Federal Magistrates Act, 28 U.S.C. §636, was amended to allow magistrates to exercise case-dispositive authority that is otherwise reserved for Article III judges. The Act states that, "[u]pon the consent of the parties," magistrate judges "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" when "specially designated to exercise such jurisdiction" by the district court. *Id.* §636(c)(1). In those cases, magistrates assume the role of Article III judges: They preside at trial and issue judgments.[1]

The procedure for referring a case for disposition by a magistrate is addressed in §636(c)(2) of the Magistrates Act and in Federal Rule of Civil Procedure 73(b). Section 636(c)(2) provides that the "decision of the parties" whether to consent to the referral "shall be communicated to the clerk of court." Rule 73(b) sets forth the mechanism by which the parties give their consent:

> Consent. When a magistrate judge has been designated [by the district court] to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. §636(c). If, *within the period specified by local rule*, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of

[1] We use the terms "magistrate judge" and "magistrate" interchangeably throughout the brief.

> consent or separate forms of consent setting forth such election.

(emphasis added). The Federal Rules of Civil Procedure also provide a sample consent form. Fed. R. Civ. P. Appendix of Forms, Form 34.

The United States District Court for the Southern District of Texas—the relevant district court here—has established detailed procedures governing the referral of cases to magistrate judges, as have most district courts. At the time Withrow's case was filed, the procedures for referral to magistrate judges in the Southern District of Texas were governed by General Order No. 80-5.[2] That order instructed the clerk of the court to notify the parties that they may consent to have a magistrate "conduct any or all proceedings in the case and order the entry of a final judgment." General Order No. 80-5, Art. III §B(1), Br. in Opp. to Pet. for Cert., App. 7A. The notice was to be mailed to the plaintiff at the time the action was filed and to the other parties as attachments to copies of the summons and complaint. The General Order provided that a case could only be referred to a magistrate judge if consent was first provided in writing by all the parties:

> 2. *Execution of Consent.*
>
> The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any district judge or magistrate, unless all parties have consented to the reference to a magistrate. No district judge, magistrate, or

[2] General Order 80-5 has been replaced by General Order 2001-6, which is substantially similar and also requires that all parties consent prior to referral to a magistrate judge.

other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a district judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

3. *Reference*

After the consent form has been executed and filed, the clerk shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate. *Once the case has been assigned to a magistrate*, the magistrate shall have the authority to conduct any and all proceedings to which the parties *have consented* and to direct the clerk of the court to enter a final judgment in the same manner as if a district judge had presided.

Br. in Opp. to Pet. for Cert., App. 7A (emphasis added).

B. Factual Background

In May of 1995, Jon Michael Withrow fell from his prison bunk and broke his ankle. Withrow was taken to the prison infirmary, where he was given pain medication and a bandage. He was returned to the prison population, where he had to walk around the prison to obtain food, clothing, and other necessities. It was not until three days later that prison doctors ordered X-rays, which confirmed that Withrow had broken his ankle. Withrow was admitted to the hospital six days after the accident, where he underwent surgery. Complaint ¶¶ 17-124 (D.E. 1). It is undisputed that Withrow had a severely broken ankle, was required to undergo surgery, and has never regained full use of his ankle. Tr., Final Pretrial Conference and Jury Trial—Day One, Vol. 1, p. 114 (D.E. 229) (opening statement of counsel for defendants).

On April 30, 1997, Withrow filed this *pro se* lawsuit under 42 U.S.C. §1983 charging that Joseph Roell and James Reagan, prison physicians, and Petra Garibay and Danny Knutson, prison nurses, were deliberately indifferent to his medical needs in violation of the Eighth Amendment. The case was assigned to United States District Judge Hayden Head.

The issue of consent to referral to a magistrate judge first came up at a *Spears* hearing on September 9, 1997, before Magistrate Judge B. Janice Ellington.[3] Withrow and Jean Wong from the Texas Attorney General's office attended the hearing. Magistrate Judge Ellington explained that she could decide case-dispositive matters only if both the defendants and Withrow consented to have her preside at trial and enter final judgment. Joint Appendix ("J.A.") 10-11. Withrow gave express oral consent at the hearing, and then signed a consent form that was filed with the court. J.A. 11; Cert. Pet. App. 20a. Ms. Wong did not consent, explaining that "[t]hese two cases for today have not been assigned so I would not be able to consent at this time, but the attorneys that will be assigned will be able to make that decision." J.A. 11. The Magistrate Judge asked Ms. Wong if she would "talk to the attorneys who have been assigned the case to see if they will execute consent forms?" *Id.* Ms. Wong responded "Yes, Your Honor, I'll do that." *Id.*

The district court did not await the consent of defendants, as the local rules required, but instead referred the case to Magistrate Judge Ellington on December 29, 1997. Cert. Pet. App. 16a-17a, 21a. In his referral order, Judge Head noted that only plaintiff had consented, and he stated that "all defendants

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[3] In the Fifth Circuit, a *Spears* hearing substitutes for a motion for a more definite statement in *pro se* cases and provides an opportunity for the court to dismiss the case as frivolous if the complaint lacks legal or factual support. *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). In Withrow's case, the magistrate found the evidence sufficient to proceed to trial.

will be given an opportunity to consent to the jurisdiction of the magistrate judge. If all defendants do not consent, this order of reference will be vacated, and the case will be returned to the docket of this judge for final disposition." *Id.*

On January 14, 1998, Magistrate Judge Ellington ordered the clerk to send to defendants Judge Hayden's December 29, 1997 Order, along with a summons and a copy of the complaint. Defendants were directed to respond to the complaint and in their response to "include a statement that 'All defendants consent to the jurisdiction of a United States Magistrate Judge' or 'All defendants do not consent to the jurisdiction of a United States Magistrate Judge.'" J.A. 13. Defendant Reagan responded that he consented to the referral; defendants Roell and Garibay did not indicate whether or not they consented. Cert. Pet. App. 17a.[4]

During a telephone hearing on April 27, 1999, Magistrate Judge Ellington reminded counsel for defendants that "all defendants need to consent before I can hear a case," J.A. 16, but defendants did not consent orally or in writing at that time or thereafter. Again, on July 21, 1999, Magistrate Judge Ellington raised the issue of consent, but defendants did not consent to the referral. J.A. 18.

The defendants filed a motion for summary judgment, which the magistrate denied because she concluded that genuine issues of material fact were in dispute and that defendants were not entitled to qualified immunity. Cert. Pet. App. 25a-26a. The case then went to trial before a jury. During jury selection, Magistrate Judge Ellington stated incorrectly that the parties had consented to a trial before a magistrate. *Id.* at 27a. Defendants Roell and Garibay neither agreed with nor objected to this statement, nor did they use the occasion to consent to the reference, although they and their counsel were present in court.

[4] Defendant Knutson settled and was dismissed from the suit on October 20, 1999.

Cert. Pet. App. 18a. After a three-day trial, the jury returned a verdict for defendants. Magistrate Judge Ellington issued judgment in favor of defendants on May 15, 2000. *Id.* at 28a. Withrow then filed a timely notice of appeal.

C. Post-Trial Proceedings.

On November 21, 2000, before any briefs were filed, the Fifth Circuit *sua sponte* remanded the case to the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." Cert. Pet. App. 13a. The Fifth Circuit retained jurisdiction pending district court compliance with its order. *Id.*

On remand, defendants Roell and Garibay consented for the first time. They filed written consent, in which they stated that "they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." Cert. Pet. App. 22a.

The district court referred the issue to Magistrate Judge Ellington for a report and recommendation. Cert. Pet. App. 16a. Magistrate Judge Ellington noted that all defendants had been directed to file a statement as to whether they consented to trial before a magistrate judge at the time they received service of process, but that only defendant Reagan had complied with that order. *Id.* at 17a. Nor had defendants Roell and Garibay given oral consent to the reference in the six hearings that preceded the trial. *Id.* Magistrate Judge Ellington concluded that defendants Roell and Garibay had not expressly consented until after the jury issued its decision, and that such belated consent failed to confer on her the authority to preside at trial and issue a judgment. *Id.* at 19a. The district court adopted the report and recommendation over defendants' objections, and the case returned to the Fifth Circuit. *Id.* at 14a.

In his appellate brief, Withrow argued that 28 U.S.C. §636(c)(1) requires pretrial consent and thus that Magistrate

Judge Ellington had no authority to enter a final judgment. He explained that he "was completely unaware that Defendants Garibay and Roell had not consented until this Court notified him of such." Withrow's Appellate Br. at 9, *Withrow v. Roell*, 288 F.3d 199 (5th Cir. 2002). Withrow also expressed his concern that defendants had engaged in gamesmanship, noting that although the question whether the parties had consented was raised on numerous occasions, defendants had carefully avoided either granting or withholding consent. *Id.* at 5-7. Withrow argued that "the Defendants delayed consenting so that if they lost at trial a claim of lack of jurisdiction could be raised." *Id.* at 5.

Defendants acknowledged that whether the parties consented to referral of case-dispositive authority to the magistrate judge is a jurisdictional question subject to *de novo* review in the court of appeals. Defendants' Appellate Br. at 2, *Withrow v. Roell*, 288 F.3d 199 (5th Cir. 2002). This was not a problem, according to defendants, because "[a]lthough no written or oral consent to trial by [the] Magistrate appears in the record prior to the time of trial, Roell and Garibay did consent to the Magistrate's jurisdiction, as demonstrated by the actions of the lower court and all parties." *Id.* at 1. Defendants noted that the magistrate judge had discussed the need for all parties to consent at several hearings, and on a few occasions appeared to believe that defendants had already consented, but defendants admitted that they had never given explicit consent. *Id.* at 1-3. Defendants urged the Fifth Circuit to join the Seventh and Eleventh Circuits in concluding that "'belated' consent cures jurisdictional defects." *Id.* at 4.

The Fifth Circuit held that defendants had not consented to the referral prior to the trial, as required by the Magistrates Act. The court rejected defendants' argument that their post-judgment consent was sufficient, noting that the plain language of the Act makes consent a "condition precedent" to a magistrate judge's exercise of authority pursuant §636(c) and

that the legislative history confirms this reading. Cert. Pet. App. 8a. The court commented that the rule urged by defendants would lead to gamesmanship: Parties would be tempted to withhold consent, await the outcome of trial, and then consent only if they prevailed. *Id.* at 9a. In this very case, the court commented, "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." *Id.* at 10a. In addition, the Fifth Circuit explained that permitting post-judgment consent requires inferring from a party's post-judgment statement that the party had consented pretrial, which contradicts Fifth Circuit precedent that consent must be explicit, not inferred from the parties' actions. *Id.* at 9a-10a. Finding that defendants' lack of consent was a jurisdictional error, the Fifth Circuit vacated the judgment and remanded the case for retrial. *Id.* at 10a.

SUMMARY OF ARGUMENT

The Federal Magistrates Act, which states that magistrates may try cases and enter appealable orders "*upon* consent" of the parties, requires that parties communicate consent before magistrates exercise that authority. The legislative history confirms that Congress intended consent to come before, not after, a magistrate takes over the role of an Article III judge by presiding at trial and entering judgment. Because two defendants in this case did not consent until after trial, the magistrate had no authority to conduct the trial or enter judgment.

Congress did not intend to allow parties to consent after judgment. As defendants concede (Pet. Br. 35 n.13), such a rule would create an incentive for parties to withhold consent until after trials are complete, and then to give consent only if they won and demand a retrial if they lost. Such retrials would delay the administration of justice, waste judicial resources, and increase the workload of Article III judges, undermining the goals of the Magistrates Act. In addition, allowing parties to

withhold consent until after a verdict is unfair to those litigants, such as Withrow, who consent before trial and, in defendants' view, are bound into the final result even though their opponents are free to demand a new trial.

Even if the text, purpose, and legislative history of the Act were ambiguous—and they are not—the Act should be construed to avoid the serious constitutional concerns that arise when a non-Article III decision-maker presides over federal cases absent the parties' express consent. Because the parties' voluntary and informed consent is a constitutional prerequisite to a magistrate's exercise of case-dispositive authority, it must be given before, not after, a magistrate purports to exercise the powers of an Article III judge.

In addition, even assuming that the Magistrates Act does not itself require pretrial consent, it certainly does not prohibit district courts from requiring it. The local rules of the Southern District of Texas require that all parties file written consent before a magistrate judge can exercise case-dispositive authority pursuant to §636(c)(1). Because defendants failed to do so, the magistrate judge had no authority to preside over their case and enter judgment.

Failure to consent is an error that must be raised *sua sponte* by an appellate court. Lack of consent deprives magistrates of the power to conduct trials and enter judgments. Consequently, a purported "judgment" issued by a magistrate acting without the parties' unanimous consent is no more valid or appealable than one issued by a former magistrate judge whose term has expired. Appellate courts are not only permitted to raise, *sua sponte*, questions regarding a magistrate's authority to issue a judgment under review, they are required to do so.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT REQUIRES CONSENT OF ALL PARTIES BEFORE A MAGISTRATE JUDGE MAY PRESIDE AT TRIAL AND ENTER JUDGMENT.

A. Section 636(c) Mandates Unambiguous Pretrial Consent.

The Magistrates Act requires that all parties *unambiguously* consent *before* a magistrate can exercise case-dispositive authority under §636(c). Neither defendants' post-judgment statement of consent nor their pre-judgment conduct satisfied this requirement.

1. *All Parties Must Consent Before Trial Begins.*

The Magistrates Act provides: "Upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." 28 U.S.C. §636(c)(1). "Upon" is defined as "thereafter; thereon." Webster's New Collegiate Dictionary 1285 (1977). Thus, under the plain language of the statute, consent is a "precondition" to the magistrate's exercise of case-dispositive power; without it, a magistrate cannot preside over a trial or enter judgment. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 540 (9th Cir. 1984) (*en banc*); *see also Wharton-Thomas v. United States*, 721 F.2d 922, 925 (3d Cir. 1983) ("consent is required before a magistrate may act under §636(c)"); S. Rep. 96-74, at 13 (1979) (consent is a "prerequisite" to magistrate's exercise of authority under §636(c)); H.R. Conf. Rep. 96-444, at 7 (1979); S. Conf. Rep. 96-322, at 7 (1979).

"Upon" is used repeatedly throughout the Act to mean "thereafter." For example, §636(h) states that a "magistrate judge who has retired may, *upon the consent* of the chief judge

of the district involved, be recalled to serve as a magistrate judge . . . ." (Emphasis added.) Even defendants must concede that a retired magistrate judge cannot return to his or her post *prior* to receiving the chief judge's consent to do so. Likewise, §636(e)(3), which allows magistrates to hold parties in contempt, provides that "[d]isposition of such contempt shall be conducted *upon* notice and hearing under the Federal Rules of Criminal Procedure." (Emphasis added.) Without question, a party cannot be held in contempt without first being given notice and a hearing. Because the normal rule of statutory construction "assumes that identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal citations and quotations omitted), the word "upon" in §636(c)(1) must mean "thereafter" just as it does in §§636(h) and (e)(3).

Several other provisions of the Act confirm that the parties must consent before a magistrate may preside at trial and enter judgment. For example, §636(c)(2) requires the clerk to notify the parties of the availability of a magistrate "at the time the action is filed," after which the "decision of the parties [whether to consent] shall be communicated to the clerk of court." This provision strongly suggests that the parties' decision will be communicated to the clerk soon after the action is filed, not after judgment is entered. If the parties do not consent, §636(c)(2) provides that "either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences." Neither the district judge nor the magistrate could continue to inform the parties of the availability of a magistrate, or advise parties that they are free to withhold consent without adverse

consequences, if judgment had already been entered by a magistrate.[5]

Furthermore, §636(e)(3) grants magistrates contempt authority "[i]n any case in which a United States magistrate judge presides *with the consent* of the parties under subsection (c) of this section . . ." (emphasis added). Magistrates' power to penalize parties for contempt of court during civil proceedings, like their power to preside over those proceedings in the first place, emanates from the parties' consent. The magistrate, of course, needs to know whether he or she can issue contempt citations at the time of the trial, and thus it makes no sense to read the Act as permitting parties to consent after a trial is concluded.

In sum, the text of the Magistrates Act requires pretrial consent. Because defendants did not consent until after they received a judgment in their favor, Magistrate Judge Ellington never had authority to preside over the trial or issue the judgment.

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[5] In a now-repealed provision of the Magistrates Act, Congress gave parties in §636(c)(1) cases the option to appeal the magistrate's final judgment to the district court, rather than to the circuit court. The Act provided that "at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court . . . ." The Federal Magistrate Act of 1979, Pub. L. No. 96-82, §2(2), 93 Stat. 643 (previously codified at 28 U.S.C. §636(c)(4)) (repealed 1996). Parties can only be described as "further" consenting to appeal to a district court if they have *already* consented to the magistrate's exercise of jurisdiction over their case.

In the legislative history discussing this provision, Congress raised concerns about the timing of consent and the potential for gamesmanship. The House Report stated that, "to prevent gamesmanship on the part of attorneys, parties should consent to where their appeal goes *at the same time as they consent to trial by the magistrate*." H.R. Rep. No. 96-287, at 6 (1979) (emphasis added).

2. *Silence Is Not Consent.*

Defendants argue that their post-judgment consent merely "confirmed" that they had consented all along. Pet. Br. 34. In an effort to portray themselves as having consented before judgment, defendants contend that proceeding before the magistrate without objection was equivalent to giving consent. Pet. Br. 28-34.

Try as they might, defendants cannot transform silence into consent. "Consent" is defined as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person." Black's Law Dictionary 300 (7th ed. 1999). The Act requires that the parties "*affirmatively* and mutually relinquish [their] right [to an Article III judge] in order for a magistrate to try the litigation." Peter G. McCabe, "The Federal Magistrate Act of 1979," 16 Harv. J. Legis. 343, 374 (1979) (emphasis added). Defendants never did so. Defendants' "[f]ailure to object is not equal to consent," *Rembert v. Apfel*, 213 F.3d 1331, 1334 (11th Cir. 2000), and thus defendants' inaction did not permit Magistrate Judge Ellington to exercise the case-dispositive authority otherwise reserved for Article III judges.[6]

To read "consent" from silence, as defendants propose, would turn §636(c)(1) on its head: Congress provided that Article III judges must preside over civil cases unless all the parties *consent* to a magistrate judge; defendants argue that magistrate judges may preside unless a party *objects* and insists upon an

[6] Every circuit court to address the issue has concluded that consent must be clear and unambiguous, not implied. *See, e.g., Rembert*, 213 F.3d at 1334-35; *Nasca v. Peoplesoft*, 160 F.3d 578, 579 (9th Cir. 1998); *Mark I, Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994); *New York Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 21, 23-24 (2d Cir. 1993); *Ambrose v. Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984); *Glover v. Alabama Bd. of Corrections*, 660 F.2d 120, 124 (5th Cir. 1981).

Article III judge. In essence, defendants would transform §636(c)(1) from an opt-in to an opt-out system.[7]

Federal Rule of Civil Procedure 73(b) confirms that consent cannot be inferred. That Rule states that the parties "shall execute and file a joint form of consent or separate forms of consent setting forth such election." Defendants acknowledge the existence of Rule 73(b), Pet. Br. 30 n.11, but nonetheless appear to argue that consent need not be in writing. Pet. Br. 13. The Federal Rules of Civil Procedure have the same binding effect as any statute and thus defendants have no basis for claiming that written consent is not required. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Although the

[7] The Judicial Conference's Committee on the Administration of the Magistrate Judges System considered whether the Magistrates Act should be "modif[ied]" by "adoption of an 'opt out' or waiver system of obtaining litigant consent to civil trial before a magistrate judge to replace the specific consent requirement in the Federal Magistrates Act." Magistrate Judges Division of the Administrative Office of the United States Courts, "A Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. 247, 305 (1993). The Committee ultimately decided "not to endorse th[is] proposed modification[]." *Id.*

As defendants note, several district courts assign cases to magistrate judges in the first instance, but then require that the cases be reassigned to a district judge if the parties do not consent. Pet. Br. 32 n.12. Such rules acknowledge that, absent consent, a magistrate may not preside at trial or issue judgment. Although a few district courts have, in the past, established local rules allowing magistrates to preside unless the parties objected, these opt-out systems have been rejected by every circuit to review them. *See, e.g., Rembert*, 213 F.3d at 1334-35 (finding the Southern District of Alabama's "consent through inaction" system insufficient to establish the consent required before a magistrate can act pursuant to 28 U.S.C. 636(c)); *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1109 (9th Cir. 1999) (holding District of Montana's opt-out rule invalid). The District of New Hampshire is the only district that currently maintains an opt-out rule. *See* D. N.H. LR 73.1(b)(2)(B); *see also* Appendix to this Brief (describing local rules in 89 district courts). To our knowledge, New Hampshire's rule has never been reviewed by any court.

question whether consent must be in writing is not directly presented here, Rule 73(b)'s requirement that parties file consent forms with the district court lays to rest any argument that consent may be inferred.

Other provisions in the Magistrates Act corroborate that Congress intended the parties to articulate consent explicitly before a magistrate exercises case-dispositive authority under §636(c)(1). For example, §636(c)(2) provides that "the decision of the parties" whether to consent to the referral "shall be communicated to the clerk of court." Silence and inaction can never be "communicated" to anyone, and therefore a party's failure to object to the referral cannot be what Congress considered to be "consent." Likewise, §636(h) provides that a retired magistrate may be recalled to service "upon the consent" of the chief judge. The chief judge's failure to object to a retired magistrate's return to the bench obviously could not satisfy this requirement. In short, the consent requirement in §636(h), as in §636(c)(1), requires an affirmative act, not simply a failure to object to the status quo.

If, as defendants suggest, pretrial conduct could somehow legitimize post-judgment consent, courts would be forced to comb through the record, studying parties' actions leading up to trial to determine whether parties' conduct somehow reflected the consent they failed to memorialize. Indeed, defendants' ambiguous pre-trial conduct in this very case illustrates the problem, because it is far from clear—and certainly not undisputed—that defendants' conduct before trial "clearly evidence[d] consent." Pet. Br. 9. *See* Part II, *infra* at 24-26 (explaining that because defendants' conduct did not give "clear evidence" of consent, defendants cannot prevail even if the Act is read as they suggest). Congress could not have wanted to force courts to delve into the record and examine every aspect of a party's pretrial conduct in an attempt to read that party's mind. This Court should reject defendants' construction not only because it is odds with the text of the Act

and is unfair to consenting litigants, but also to "avoid[] an interpretation" of the Act that would "'spawn[] a second litigation of significant dimension.'" *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 609 (2001) (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)).

Significantly, defendants concede that nothing about their pre-judgment conduct would have prevented them from insisting, after judgment, that they had *not* consented to the referral to the magistrate. Defendants do not argue that pre-judgment conduct alone can satisfy §636(c)'s consent requirement, because they acknowledge that inferring consent solely from a party's conduct is not sufficiently "protective of Congress' voluntariness concerns." *See* Pet. Br. 35 n.12; *see also* Pet. Br. 33-34 (stating that their pre-judgment conduct and their post-judgment consent together satisfy §636(c)'s consent requirement because these "*two forms of consent* unambiguously establish a magistrate judge's authority to preside over a civil trial and to direct entry of judgment") (emphasis added). Thus, under defendants' reading of §636(c)(1), they had the option, at the end of trial, of *either* demanding a new trial before an Article III judge *or* giving explicit, post-judgment consent.

Because they won at trial, defendants explicitly consented. However, as the Fifth Circuit commented, "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." Cert. Pet. App. 10a. Nothing about defendants' ambiguous pretrial conduct would have prevented them from doing so. In essence, then, defendants read the Act as a one-way street: The party who consents pre-judgment is stuck with the result at trial, while the party who withholds consent may choose either to accept the verdict or demand a new trial.

B. The Legislative History And Purpose Of The Federal Magistrates Act Confirm That Consent Must Precede Trial And Judgment.

The legislative history confirms that Congress meant what it said: All parties must consent before a magistrate can exercise jurisdiction under §636(c). The Senate Report explains that the "bill clearly requires the voluntary consent of the parties as a *prerequisite* to a magistrate's exercise of the new jurisdiction." S. Rep. 96-74, at 13 (emphasis added); *see also id.* at 4 ("[T]he voluntary consent of the parties is required *before* any civil action may be referred to a magistrate.") (emphasis added). Likewise, the House Conference Report explains that "the voluntary consent of the parties is required *before* a civil action may be referred to a magistrate for a final decision." H.R. Conf. Rep. 96-444, at 7 (emphasis added).

According to defendants, Congress was concerned only that consent be voluntary, and not about "the formalities of consent." Pet. Br. 24. But the timing of consent is not a "formality"; the parties must consent before a magistrate presides at trial and enters judgment because their consent is the sole source of the magistrate's power to act in the place of an Article III judge. Moreover, requiring pre-judgment consent furthers Congress' goal of ensuring the "voluntariness, knowingness, and willingness of the consent." *See* S. Conf. Rep. No. 96-322, at 8. A party's failure to consent pretrial raises the possibility that the party is unaware that the magistrate judge is not an Article III judge, or is ignorant of the right to insist that an Article III judge preside over the case. Requiring all parties to give unambiguous pre-trial consent ensures that the parties are voluntarily choosing to have their case heard by a magistrate, just as Congress intended.

Defendants' post-judgment consent rule is also at odds with Congress' purposes in enacting the Magistrates Act. Congress hoped that magistrates would reduce the workload on Article III judges, conserve judicial resources, and provide speedy access

to justice for litigants. H.R. Rep. No. 90-1629, at 4255, 4257 (1968). Under defendants' post-judgment consent rule, savvy litigants have every incentive to manipulate the system by withholding consent until after they learn whether they have won or lost the case. If a non-consenting party loses, that party can then demand a retrial before an Article III judge. *See, e.g., Mark I, Inc. v. Gruber*, 38 F.3d 369, 371 (7th Cir. 1994) (court gave parties opportunity to consent post-judgment, but nonconsenting defendant who had lost at trial declined to consent and successfully demanded a retrial). Article III judges would then be forced to empanel new juries and rehear cases, which would do nothing to alleviate their workload, would significantly delay the process, and would increase the costs of trials for the federal court system.

Another of Congress' goals in expanding the authority of magistrate judges was to "improve access to the Federal courts for the less-advantaged." S. Rep. No. 96-74, at 1. Presumably, then, Congress did not design the Magistrates Act to allow sophisticated litigants to game the system by withholding consent until after the verdict, which would be unfair to those "less-advantaged" litigants, such as pro-se prisoners like Withrow, who consent before judgment and thus, in defendants' view, could not escape an unfavorable verdict as could their non-consenting adversaries.

In contrast, requiring pretrial consent ensures that §636(c) will operate as intended. If all parties consent, the magistrate judge will preside over the entire case; if they do not, the case will be returned to an Article III judge for decisions on all dispositive issues. True, retrials will sometimes be necessary in the rare case that a magistrate mistakenly presides over a jury trial without realizing that one or more parties failed to consent. But strict application of the pretrial consent rule will motivate magistrates, judges, parties, and clerks to be vigilant in ensuring that every party has clearly consented before taking a case to trial before a magistrate. Moreover, whereas under a pretrial

consent system, retrials may occur as a result of an error, under defendants' post-judgment consent system, retrials would occur as part of the normal operation of the rule. Thus, the number of retrials under a pre-judgment consent rule will be far fewer than if parties are permitted to await the outcome of the trial before deciding whether to consent.

Defendants claim that requiring retrial absent unanimous, pretrial consent would also inspire parties to "game" the system. They posit that, if the courts do not accept belated consent, "'a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost.'" Pet. Br. 35 (quoting *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (7th Cir. 1995)). Although conceivable, this type of gamesmanship will happen very rarely, because the issue is not solely within the consenting party's control and the risks are formidable. If the consenting party wins, the lack of consent can thereafter be raised by his or her non-consenting adversary, or by the district or appellate court, requiring retrial and depriving the consenting party of victory. In any case, parties can prevent such gamesmanship by their opponents simply by consenting.

The Magistrates Act is nearly universally understood to require pretrial consent by courts around the country. Local rules in 58 districts explicitly require pretrial consent, and the local rules in another 14 districts track the "upon consent" language of the Act. *See* Appendix to this Brief 1a-7a. Sixteen districts have no rule regarding the timing of consent. *Id.* at 7a-8a. Only one district—the district of New Hampshire—maintains the rule that consent may be inferred from inaction. D. N.H. LR 73.1(b)(2)(B); *see also* Appendix to this Brief 8a. Therefore, it is not surprising that in the 24 years since the 1979 amendments provided magistrates with case-dispositive authority, only a handful of cases in four circuits discuss problems arising after a trial was held mistakenly without the consent of all parties. The bright-line rule urged by Withrow

will preserve the status quo, while the inferred-consent-plus-post-judgment-confirmation scheme proposed by defendants will greatly exacerbate the problem.

As defendants note, magistrates have become an essential part of the federal court system. *See* Pet. Br. 16-21. To preserve magistrate judges' vital role, defendants argue that the consent requirement should be read "broadly" to permit belated consent. Pet. Br. 25-28. The success of the current system, however, only bolsters the argument for requiring pretrial consent. Parties already consent before trial in most cases because most litigants and courts believe that §636(c) and Rule 73(b) require it, and because pretrial consent is mandated by the rules of the great majority of district courts. *See* Appendix to this Brief 1a-7a. If the Act is construed to allow post-judgment consent, it will disrupt the use of magistrate judges by encouraging parties either to game the system or to insist on trial before an Article III to prevent their opponents from sandbagging them.[8]

C. Interpreting The Federal Magistrates Act To Permit Post-Judgment Consent Would Violate The Doctrine Of Constitutional Avoidance.

As discussed above, the text, purpose, and legislative history of the Federal Magistrates Act demonstrate that Congress required pretrial consent. In addition, reading the statute to permit a magistrate to preside at trial and enter final judgment without first obtaining the affirmative consent of all the parties

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[8] The Seventh and Eleventh Circuit decisions permitting post-judgment consent addressed the issue in only a few paragraphs and did not refer to the text or legislative history of the Magistrates Act in reaching that conclusion. *See Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998); *General Trading Inc., v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (11th Cir. 1997); *American Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (7th Cir. 1995); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (7th Cir. 1995); *King v. Ionization Int'l*, 825 F.2d 1180, 1185 (7th Cir. 1987).

would raise serious constitutional questions and thus should be avoided. *See, e.g., Peretz v. United States*, 501 U.S. 923, 929 (1991) (describing the Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues") (citing *Gomez v. United States*, 490 U.S. 858, 864 (1989)); *Glover v. Alabama Bd. of Corrections*, 660 F.2d 120, 124 (5th Cir. 1981) (construing the parties' consent narrowly to avoid constitutional questions); *see also* Note, "Masters and Magistrates in the Federal Courts," 88 Harv. L. Rev. 779, 780-89 (1975) (discussing constitutional limitations on delegations of judicial power). This canon of constitutional avoidance is particularly important given the "inherent complexity" of Article III questions. *Peretz*, 501 U.S. at 949 (Marshall, J., dissenting); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment) ("Particularly in an area of constitutional law such as that of 'Art. III Courts,' . . . rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.")

Delegation of Article III powers to non-Article III decision-makers implicates individual as well as structural interests. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). Individuals, however, can choose to forgo their personal right to an Article III judge, and thus the "consent of litigants, in both criminal and civil cases, has become a key factor in determining the validity of a non-Article III tribunal." *See* "Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. at 290. Indeed, the overriding theme in this Court's Article III jurisprudence is the necessity of consent to the constitutionality of delegation of Article III powers. For example, in *Northern Pipeline,* the Court held that a "traditional" state common-law action could not be decided by a non-Article III bankruptcy judge absent the consent of the parties. 458 U.S. at 89-92 (Rehnquist, J., concurring in

judgment). Again, in *Schor*, the Court emphasized the importance of consent, noting that requiring the parties' consent not only addressed the problem of an individual's right to an Article III judge, but also lessened the structural concerns that arise when Article III powers are delegated to non-Article III courts. 478 U.S. at 854-55 (noting that concerns over erosion of separation of powers are lessened when litigants are free to choose the forum for adjudication).

Consent is just as vital in the context of the Federal Magistrates Act. In *Gomez*, the Court discussed the 1979 amendments and commented that a "critical limitation on this expanded jurisdiction is consent." 490 U.S. at 870. Illustrating the significance of consent, *Gomez* held that a magistrate judge may not preside at jury selection in a felony trial absent the defendant's consent. But just a few years later, in *Peretz*, this Court upheld the delegation of that very power because the parties had consented. The Court explained that "[t]his case differs critically from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it." 501 U.S. at 932.

Although this Court has never addressed the constitutionality of §636(c), twelve courts of appeals have upheld this expansion of magistrate judges' jurisdiction. *See* "A Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. at 252 n.12 (collecting cases). In doing so, however, every single court relied heavily on the consent requirement, which these courts understood as requiring the parties to consent *before* referral. For example, the *en banc* Ninth Circuit, per then-Judge Kennedy, stated: "We hold that, in light of the statutory *precondition* of voluntary litigant consent . . . the conduct of civil trials by magistrates is constitutional." *Pacemaker Diagnostic Clinic*, 725 F.2d at 540 (emphasis added). Likewise, the Third Circuit reasoned that the delegation of case-dispositive authority to magistrate judges is constitutional because "the litigants' consent is required *before* a magistrate may act under

section 636(c)." *Wharton-Thomas*, 721 F.2d at 925 (emphasis added). *See also Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985) ("[T]he reasoning of *Northern Pipeline* does not apply in situations, such as this one, where the magistrate is acting *with* the consent of the parties.") (Emphasis added.)

In defendants' view, the Magistrates Act does not require pretrial consent, but instead permits a magistrate to preside at trial and enter final judgment as long as no party objects. Their interpretation casts constitutional doubt on the entire referral process, because magistrates would be exercising Article III powers without the consent necessary to alleviate the individual and structural concerns that arise whenever Article III powers are delegated to non-Article III actors. Thus, the "principle of constitutional avoidance" requires that the Act be construed to prohibit post-judgment consent because there is no "evidence that Congress actually intended to permit magistrates to take on a role that raise[s] a substantial constitutional question." *Peretz*, 501 U.S. at 929-30.

II. DEFENDANTS' PRETRIAL SILENCE WAS NOT CONSENT.

Defendants argue that post-judgment "confirmatory consent" satisfies §636(c)(1) as long as the party's "pre-judgment conduct" "clearly evidences consent." Pet. Br. 9. In Withrow's view, as discussed above, the Magistrates Act and Rule 73(b) forbid basing consent on inferences drawn from defendants' pretrial conduct. However, even if the Magistrates Act were read as defendants propose, defendants' pretrial conduct does not satisfy their own standard because their conduct was just as consistent with an intent to withhold consent as to grant it. Thus, defendants could not prevail even on their own terms.

Defendants' counsel refused to give consent when first asked to do so. At the *Spears* hearing, Magistrate Judge Ellington asked Jean Wong, the attorney from the Texas Attorney

General's Office, if the defendants would consent to having her preside at trial and enter final judgment. Ms. Wong responded, "These two cases for today have not been assigned, so *I would not be able to consent at this time*, but the attorneys that will be assigned will be able to make that decision." J.A. 11 (emphasis added). However, defendants Roell and Garibay and their attorney never again addressed the issue, even after defendant Reagan consented and consent was discussed by Magistrate Judge Ellington at two subsequent hearings and before the jury at the start of trial. Thus, despite multiple opportunities to consent, and several reminders that consent is a necessary prerequisite to the magistrate judge's exercise of jurisdiction, defendants Roell and Garibay never consented.

Defendants claim that their pretrial behavior is consistent with consent because they proceeded to try the case before the magistrate without objection. Pet. Br. 29. The Magistrates Act permits magistrates to preside over pretrial proceedings and non-dispositive matters without first obtaining the parties' consent, *see* 28 U.S.C. §636(b), so defendants' participation in such proceedings did not suggest their intention to consent to Magistrate Judge Ellington's exercise of case-dispositive authority. Furthermore, at the time this case was filed, the Fifth Circuit had already stated on numerous occasions that consent cannot be inferred from the parties' actions because a "magistrate judge may act in the capacity of a federal district judge under 28 U.S.C. §636(c) *only* upon the express, written consent of both parties." *McGinnis v. Shalala*, 2 F.3d 548, 551 (5th Cir. 1993) (emphasis in original) (citing *Archie v. Christian*, 808 F.2d 1132, 1137 (5th Cir. 1987) (*en banc*)). Thus, defendants had no reason to think their silence would be understood as consent.

Because defendants' silence did not clearly evidence consent, and, in fact, was just as consistent with an intent to withhold consent, they could not prevail even if their interpretation of the Federal Magistrates Act were correct. Moreover, the difficulty

of ascertaining defendants' mental state from their pretrial conduct illustrates that defendants' "pretrial-conduct-plus-post-judgment-consent" scheme is an unworkable rule that Congress never intended.

III. THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE FIFTH CIRCUIT'S JUDGMENT.

As stated in Withrow's Brief in Opposition to the Petition for Writ of Certiorari, *id.* at 12-17, the local rules in the Southern District of Texas, which also require explicit pretrial consent, provide an alternative ground for sustaining the Fifth Circuit's decision. Even if defendants were correct that the Magistrates Act itself "does not require a specific form or time of consent" Pet. Br. 13, the local rules of the Southern District of Texas mandate that parties provide *written* consent *before* a case can be heard and decided by a magistrate. Thus, the result in this case does not turn solely on the requirements of the Magistrates Act.

District courts are free to enact local rules of procedure as long as those rules are "consistent with" federal statutes and the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83(a)(1). Even if the Magistrates Act does not require express pretrial consent, as we believe it does, it certainly does not bar district courts from establishing local rules mandating pretrial consent. To the contrary, as discussed above, *supra* at 18, requiring consent before trial promotes the Act's goal of protecting the "voluntariness, knowingness, and willingness of the consent" to referral. *See* S. Conf. Rep. No. 96-322, at 8.

Moreover, both the Magistrates Act and Federal Rule of Civil Procedure 73(b) expressly contemplate that district courts will establish procedural rules governing the use of magistrates, including the timing of consent to referrals. Section 636(c)(2)

of the Act states: "*Rules of court* for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." (Emphasis added.) Federal Rule of Civil Procedure 73(b), in turn, confirms that local rules govern the time period within which the parties must express their consent to the referral: "If, *within the period specified by local rule*, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election." (Emphasis added.) The advisory committee notes explain that "flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made." Advisory Committee Note to Fed. R. Civ. P. 73(b). Thus, the Magistrates Act and Rule 73(b) grant the Southern District of Texas the authority to impose a reasonable deadline by which the parties must consent.

And the Southern District of Texas has done so. As explained above, *supra* at 3-4, General Order 80-5 stated that it is only "*[a]fter the consent form has been executed and filed,*" that the clerk "shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate." Br. in Opp. to Pet. for Cert., App. 7A (emphasis added). Thus, in the Southern District of Texas, the consent form must *first* be executed by all parties, and only thereafter can the case be referred to a magistrate.

Defendants did not comply with the local rule. Although defendants received the requisite notice and form regarding referral to the magistrate as part of service of process, they failed to fill out and return that form. And although Magistrate Judge Ellington mentioned during several hearings that the parties were required to consent to the referral, defendants never did so. *See supra* at 5-6. Defendants' violation of the local requirements is an alternative ground for concluding that

Magistrate Judge Ellington lacked authority to preside over this case.[9]

IV. THE FIFTH CIRCUIT PROPERLY RAISED THE ISSUE OF CONSENT *SUA SPONTE*.

Defendants contend that even if Magistrate Judge Ellington had no authority to conduct the trial below and enter judgment, the Fifth Circuit should not have questioned, *sua sponte*, the validity of that judgment. Pet. Br. 36-44.

As a threshold matter, defendants waived this argument because they did not raise it at any point below. *See, e.g.,*

[9] Although the question whether the local rules for the Southern District of Texas mandate pre-judgment consent was not raised below, the record is sufficient for the Court to decide this issue. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (respondent "may rely upon any matter appearing in the record in support of the judgment below."); R. Stern, et al., Supreme Court Practice 444-45 (8th ed. 2002). The Magistrates Act and Rule 73(b), both of which were discussed in the opinion below, *see* Cert. Pet. App. 3a, allow courts to establish procedures implementing the Act. Because the question whether the Southern District of Texas' local rules required pre-judgment consent is intertwined with the question whether the Act requires (or at least permits) pretrial consent, it should be considered by this Court. *See, e.g., Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (deciding case on an issue that had not been raised by the parties because the issue was "antecedent to these [issues presented] and ultimately dispositive of the present dispute."); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing issue raised only in *amicus* brief).

In the proceedings below, Withrow, a *pro se* prisoner, was unaware that defendants had not consented until that issue was raised by the Fifth Circuit. *See* Withrow's Appellate Br. at 9. Thus, his failure to raise this issue should be excused. Moreover, reliance on the local rules would allow this Court to avoid the constitutional issues involved in addressing the Magistrates Act's consent requirement, *see supra* at 21-24. *Cf. Blum*, 457 U.S. 132 (affirming on statutory ground lower court decision based on constitutional ground). Finally, defendants are not prejudiced by having to address the local rules issue because it is a purely legal issue and it was raised in the opposition to their petition for writ of certiorari. *See* Br. in Opp. to Pet. for Cert. at 12.

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991). Defendants were given an opportunity to submit briefs on the question of consent, or lack thereof, to the district court and then to the Fifth Circuit. Not only did defendants fail to argue that the issue should not be addressed *sua sponte*, they actually maintained in their brief to the Fifth Circuit that "[w]hether all parties consented to [the] Magistrate is a jurisdictional question." Defendants' Appellate Br. at 2. Defendants urged the Fifth Circuit to join the Seventh and Eleventh Circuits in concluding that "'belated' consent cures *jurisdictional* defects." *Id.* at 4 (emphasis added). Defendants are not permitted to take a contrary position for the first time before this Court. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.") (citation omitted).

In any event, appellate courts have an obligation to question the authority of a magistrate judge to enter a valid judgment. Defendants are correct that lack of consent does not implicate the Fifth Circuit's *subject-matter* jurisdiction over Withrow's case in the sense that his complaint presented a federal question. However, it did deprive the magistrate of any authority to preside at trial and issue a judgment, which is akin to subject matter jurisdiction in that it is a fundamental, structural error that cannot be overlooked by a reviewing court.[10]

[10] The Fifth Circuit never denied that Withrow's case concerned a federal question. Although the Fifth Circuit did not explain what it meant when it referred to lack of consent to a magistrate's entry of a final decision as a "jurisdictional error," Cert. Pet. App. 3a, it did cite to its previous decision in *EEOC v. West La. Health Servs., Inc.*, 959 F.2d 1277, 1282 (5th Cir. 1992), which held that without consent "the magistrate simply lacked the power to try the case and enter judgment in it." (quotations and citations omitted). In *Mendes Jr. Int'l Co. v. M/V Sokai Maru*, 978 F.2d 920, 924 (5th Cir. 1992), also cited in the opinion below, Cert. Pet. App. 3a, the Fifth Circuit explained

Magistrate Judge Ellington is not an Article III judge, and thus she could only exercise Article III power under the carefully circumscribed limits of the Magistrates Act. Section 636(c)(1) empowers a magistrate judge to preside at trial and enter judgment only when the magistrate is designated by a district court and the parties have consented to have her take on that role. Thus, a "judgment" issued by a magistrate without the parties' consent is no more valid and appealable than if it had been issued by a law clerk or courtroom deputy or any other unauthorized, non-Article III actor. Because defendants never consented, Magistrate Judge Ellington's decision was a nullity.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III and the statutes enacted by Congress pursuant thereto. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Id.* (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

This Court has long held that a defect in the lower court's authority to issue a judgment is the type of jurisdictional error that cannot be excused by a reviewing court. In *Frad v. Kelly*, 302 U.S. 312 (1937), the Court concluded that a judge from the Eastern District of New York who had presided at a trial on temporary assignment in another district had no statutory authority to supervise that defendant's probation after returning to the Eastern District. *Id.* at 318. Although the probation officer and the United States attorney had stipulated that the judge could oversee probation, the judge's orders were

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that such an error results in a "lack of jurisdiction (or at least a fundamental error that may be complained of for the first time on appeal)." In sum, the Fifth Circuit has repeatedly held that lack of consent deprives a magistrate of *authority* to enter a final judgment, and noted that it is the type of error that can and should be raised by the court.

nonetheless "null" because these officers "could not waive the jurisdictional requirements of the Probation Act or by their conduct confer jurisdiction on a judge of another district to act for the trial court in which alone the statute vests the power to deal with the subject." *Id.* at 319.

Likewise, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court considered whether judges from the Court of Claims and the Court of Customs and Patent Appeals can properly be designated to sit as court of appeals judges. The Court addressed the issue despite the parties' failure to raise it below, explaining that:

> when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity.

Id. at 535-36 (plurality).

This Court has taken the same position when reviewing decisions issued by magistrates that are beyond the scope of their authority. In *Wingo v. Wedding*, 418 U.S. 461 (1974), the Court concluded that a magistrate had no authority to preside over a federal habeas corpus evidentiary hearing, and thus vacated the opinion and remanded for a new evidentiary hearing before an Article III judge. Similarly, in *Gomez*, which held that a magistrate did not have authority to conduct jury selection absent the defendant's consent, the Court held that the error could not be excused as harmless because the magistrate lacked "jurisdiction to preside." 490 U.S. at 876.

The text and legislative history of the Magistrates Act confirm that failure to satisfy the statutory requirements for referrals deprives a magistrate of jurisdiction, in the sense that the magistrate lacks authority to enter a final judgment. Section 636(c)(1) provides that a magistrate may only issue final

judgments "when specially designated to exercise such *jurisdiction* by the district court or court he serves." (emphasis added). Section 636(c)(2) begins: "If a magistrate judge is designated to exercise civil *jurisdiction* under paragraph (1) of this subsection . . . ." (emphasis added). *See also* §636(c)(3) (same). In the legislative history accompanying the 1979 amendments, Congress explained that it intended to expand magistrates' jurisdiction over civil cases. The Senate Report states that the Bill "provides for case-dispositive *jurisdiction* for magistrates in civil cases where the parties to the litigation consent to the exercise of such power by the magistrate." S. Rep. 96-74, at 1 (emphasis added). In short, Congress viewed the Magistrates Act as extending to magistrates the authority—that is, the jurisdiction—to decide civil cases that they could not exercise without the Act.

Thus, every circuit to have addressed the question has concluded that if a magistrate judge did not have authority to enter judgment under §636(c), then the appellate court lacks jurisdiction to review the merits of that judgment. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001); *Hajek*, 186 F.3d at 1108; *American Suzuki Motor Corp. v. Kummer*, 65 F.3d 1381, 1385 (7th Cir. 1995); *New York Chinese TV Programs*, 996 F.2d at 23. Because a magistrate's lack of authority deprives her judgment of force and effect, that error cannot be overlooked by a reviewing court.

If defendants were correct that courts could not question, *sua sponte*, the authority of a magistrate to preside at trial and enter final judgment, then the question presented here would be almost completely insulated from judicial review. By definition, magistrates issue decisions without consent *only* when the parties are unaware of the consent requirement, unaware of the absence of consent, or unwilling to draw the court's attention to the issue. Here, for instance, Withrow—who litigated this case *pro se* while in prison—did not realize that defendants had not consented, which is why he did not raise the issue either earlier.

See Withrow's Appellate Br. at 9. Defendants, of course, would never have raised the issue on appeal because they were seeking to preserve their victory at trial. Yet, in defendants' view, Withrow's ignorance and defendants' silence prevented the Fifth Circuit from addressing this fundamental defect.

Furthermore, defendants' view that appellate courts have no right to investigate whether all parties consented is constitutionally troublesome. Defendants argue that "[w]hen a final judgment facially satisfies [28 U.S.C.] §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court." Pet. Br. 43 n.17. Following that reasoning, a magistrate judge whose term had expired could purport to enter an appealable decision—with or without the parties' consent, or even their knowledge of the defect—and the appellate court would have to review that judgment if it appeared on its face to be valid.

Furthermore, defendants' logic dictates that had Withrow been the party who did not consent because he had never been told of his right to demand an Article III judge, the issue would *still* have been insulated from appellate review. Thus, defendants would bar courts from questioning whether non-consenting litigants were properly informed of their right to proceed before an Article III judge, which would cast even more serious doubt on the constitutionality of the entire referral system.

Finally, even if defendants were correct that the magistrate's lack of authority to enter a judgment in this case did not *require* the Fifth Circuit to question that authority *sua sponte*, the Fifth Circuit nonetheless had *discretion* to do so. As this Court explained in *Silber v. United States*, 370 U.S. 717, 718 (1962), "appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the

fairness, integrity, or public reputation of judicial proceedings." These criteria are easily met in this case. Withrow was *pro se* and unfamiliar with the procedures of the Magistrates Act. If defendants were correct, by consenting to the magistrate's jurisdiction, Withrow unwittingly bound himself to a judgment that defendants were free to reject. The Fifth Circuit had discretion to correct an error that it found both fundamental and unfair.

CONCLUSION

For the reasons stated above, this Court should affirm the Fifth Circuit's holding that express, pretrial consent is required before a magistrate may exercise the powers that the Constitution has otherwise reserved for Article III judges.

Respectfully submitted,

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APPENDIX

I. The following district courts have established local rules that explicitly require pre-trial consent:

FIRST CIRCUIT:

D. Mass. LR 4(c)(3) (parties must file written consent within 20 days of the filing of answer or other responsive pleading).

D. P.R. LR 509.2 (parties must return signed consent form at least ten days before the pre-trial conference).

SECOND CIRCUIT:

D. Conn. MJR 4(A)(1) ("each magistrate judge may exercise case-dispositive authority in a civil case on the specific written request of all parties, as permitted by 28 U.S.C §636(c)(1), provided the district judge assigned to the case approves").

E.D.N.Y. LR 73.1 (once parties have signed consent form and district judge has approved transfer, clerk shall reassign case to magistrate).

N.D.N.Y. LR 72.2(b)(2)-(3) (the case is forwarded to the district judge for approval and referral of the case to a magistrate only after a completed consent form is filed).

S.D.N.Y. LR 73.1 (once parties have signed consent form and district judge has approved transfer, clerk shall reassign case to magistrate).

W.D.N.Y. LR 72.2(b)(2) (pre-trial consent required).

D. Vt. LR 73.1(e) (magistrate may only exercise authority under §636(c)(1) after all consent forms have been filed and there are no objections).

THIRD CIRCUIT:

D. Del. LR 73.1(c) (consent form signed by all the parties shall be filed with the clerk not later than ten days after the date of the final pre-trial conference).

E.D. Pa. LR 72.1 III.(b)(2) (unless otherwise ordered by the district court judge, consent forms may be filed at any time prior to trial).

M.D. Pa. LR 73.1(b) (consent form signed by all parties must be filed within sixty days after the filing date of the case).

W.D. Pa. LR 72.1.5(E)-(F) (pre-trial consent required).

D. N.J. LR 73.1(d) (consent form signed by all parties to be filed with the clerk not later than 15 days after the final pre-trial conference).

FOURTH CIRCUIT:

M.D. N.C. LR 73.1(a)-(c) (allows referrals to magistrates "after consent" of all parties).

W.D. N.C. LR 73.1(A)-(B) (plaintiff's consent form shall be mailed to the clerk on or before the date that plaintiff seeks service of the complaint; defendant must file executed consent form with his first responsive pleading. If the parties fail to execute the consent forms, the magistrate may proceed, but the parties must file the consent form at the pre-trial conference).

D. S.C. LR 73.02(B)(1) (pre-trial consent required).

S.D. W. Va. LR Mag. J. P. 3.02 (parties must file consent forms prior to trial).

FIFTH CIRCUIT:

N.D. Miss. LR 73.1(B)-(C) (consent form must be filed before trial).

S.D. Miss. LR 73.1(B)-(C) (consent form must be filed before trial).

E.D. Tex. LR 72, Appendix B., R. 3(2)-(3) (pre-trial consent required).

S.D. Tex. General Order No. 2001-6, Art. III (pre-trial consent required).

W.D. Tex. R. 72, Appendix "C", R. 3(b)(1)-(3) (pre-trial consent required).

SIXTH CIRCUIT:

E.D. Ky. LR 73.1 (c) (pre-trial consent required).

W.D. Ky. LR 73.1 (c) (pre-trial consent required).

E.D. Mich., LR 73.1(c) (parties must file a signed consent form, and consent may be entered until thirty days before scheduled trial).

W.D. Mich., LR 73.3-4 (pre-trial consent required).

S.D. Ohio, Eastern Division, Order Dated 7/3/91, IV.A. (parties must file statement indicating consent at least three days before the preliminary pre-trial conference).

E.D. Tenn. LR 72.3(a)(1)-(2) (plaintiff must file consent form within twenty days after defendant's first appearance).

M.D. Tenn., Rule 301(c), L.R.M.P. (parties must file signed form indicating consent within forty-five days of entry of appearance of the last defendant).

W.D. Tenn. LR 72.1(d) (consent required before a proceeding can commence under 28 § U.S.C. 636(c)).

SEVENTH CIRCUIT:

N.D. Ill. LR 73.1 (consent required, either in writing or in open court, before entry of a judgment).

S.D. Ill. LR 72.3(b)(3) (pre-trial consent required).

EIGHTH CIRCUIT:

E.D. Ark. LR 72.1(X)(3) (pre-trial consent required).

W.D. Ark. LR 72.1(X)(3) (pre-trial consent required).

D. Minn. LR 72.1(g)(2) (parties must return consent form to the clerk no later than one week following the initial pre-trial conference or upon order of the district court before a referral can take place).

W.D. Mo. LR 73.1(c) (pre-trial consent required).

D. Neb. LR 73.2(c) (pre-trial consent required).

NINTH CIRCUIT:

C.D. Cal. LR 6.6.3 (consent must be filed at least thirty days before the final pre-trial conference, otherwise it may be filed only with pre-approval of the district judge).

E.D. Cal. LR 73-305(a)-(b) (pre-trial consent required).

D. Idaho LR 73.1 (pre-trial consent required).

D. Mont. LR 73.2(b) (parties have thirty days from service of magistrate judge's designation to complete and return a consent form to the clerk).

D. Nev. LR IB 2-2(b) (pre-trial consent required).

E.D. Wash. LMR 12(d) (pre-trial consent required).

W.D. Wash. MJR 13(4)(d) (pre-trial consent required).

TENTH CIRCUIT:

D. Colo. L.Civ.R. 72.2(D) (written consent to proceed before a magistrate must be filed no later than ten days after the discovery cut-off; if there is no discovery, the parties shall have 40 days from the filing of the last responsive pleading to file their consent).

D. Kan. LR 72.1.3(a)(3) (pre-trial consent required).

E.D. Okla. LR 73.1(C) (the parties may consent to magistrate judge jurisdiction at any time during the pendency of a case).

W.D. Okla. L.Civ.R 73.1(E) (parties must execute and file consent form, after which district judge may approve and refer case for trial before magistrate).

N.D. Okla. LR 73.1(B) (pre-trial consent required).

D. Wyo. LR 73.1(4) (pre-trial consent required).

ELEVENTH CIRCUIT:

M.D. Ala. LR 73.1 (pre-trial consent required).

N.D. Ala. LR 73.2(c) (requiring pre-referral consent within ninety days after the case is filed; after that time, referral is only possible with express permission of the assigned district judge).

N.D. Fla. LR 73.1(A)(1) (requiring pre-trial consent within forty-five days of the date of service of the consent notice).

M.D. Fla. LR 6.05 (pre-trial consent required).

S.D. Fla. MJR 3(b) (pre-trial consent required).

N.D. Ga. LR 73.1(B)(2) (requiring that a joint form consenting to the exercise of jurisdiction by a magistrate judge be filed prior to or concurrent with the filing of the preliminary statement).

S.D. Ga. LR 73.3(b) (consent to disposition of the case by a magistrate judge must be communicated to the clerk on the appropriate form within six months after commencement of the action or at least sixty days prior to any scheduled trial date, whichever first occurs).

DISTRICT OF COLUMBIA:

L. Cv. R. 73.1(b) (notice of consent should be filed prior to entry of a pre-trial order).

II. The local rules of the following districts conform to the language of the Magistrates Act by using the terms "upon" the parties' "consent."

FIRST CIRCUIT:

D. Me. LR 73

FOURTH CIRCUIT:

W.D. Va. MJR 4(c)

FIFTH CIRCUIT:

M.D. La. LR 73.3

W.D. La. LR 73.3

SIXTH CIRCUIT:

N.D. Ohio LR 73.1(a)

SEVENTH CIRCUIT:

C.D. Ill. LR 72.1

N.D. Ind. LR 72.1(h)

S.D. Ind. LR 72.1(h)

EIGHTH CIRCUIT:

N.D. Iowa LR 73.1

S.D. Iowa LR 73.1

NINTH CIRCUIT:

D. Ala. MJR 7

S.D. Cal. LR 72.1(g)

D. Haw. LR 73.1

TENTH CIRCUIT:

D. Utah L. Civ. R. 72-2 (g)

III. The following districts do not specify the timing of consent:

FIRST CIRCUIT:

D. R.I. LR 32(d)(3)

FOURTH CIRCUIT:

D. Md. LR 301(4)

E.D.N.C. LR 73.1(a)

N.D. W. Va. (no local rules about magistrates)

FIFTH CIRCUIT:

N.D. Tx. (no local rules about magistrates)

E.D. Va. LR 72

SEVENTH CIRCUIT:

E.D. Wisc. LR 73.1

W.D. Wisc. LR 2

EIGHTH CIRCUIT:

E.D. Mo. LR 73-11.01

D. S.D. (no local rules about magistrates)

NINTH CIRCUIT:

D. Ariz. LR 2.10(b)

N.D. Cal. LR 72-1

D. Ore. LR 73.1

TENTH CIRCUIT:

D. N.M. LR 73.2(b)

D. Utah L. Civ. R. 72-2(g)

ELEVENTH CIRCUIT:

S.D. Ala. LR 72.2(c)(2)

IV. The District of New Hampshire is the only district that provides that parties waive their rights to an Article III judge if they do not object to the referral to the magistrate within 20 days of receiving notice of the referral. D. N.H. LR 73.1(b)(2)(B).

(6)

No. 02-69

Supreme Court, U.S.
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In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,

Petitioners,

v.

JON MICHAEL WITHROW,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Argument 1

I. A Technical Defect in a §636(c) Referral Does Not Negate the Parties' Voluntary, Informed Consent and, Therefore, Has No Effect on a Magistrate Judge's Authority 1

A. Consent Is a Question of Substance, Not Form 1

B. The Practical Realities of the Consent Process Should Inform the Court's Construction of §636(c) and Its Determination of the Consequence for Technical Defects in Referral Procedures 4

C. The Judgment Below Is Valid Because All Parties Consented to the Magistrate Judge's Case-Dispositive Authority Under §636(c) 7

1. Defendants' pre-judgment litigation conduct was not "ambiguous," as Withrow erroneously suggests 7

2. Inferring consent from litigation conduct is neither unprecedented nor inconsistent with §636(c) 10

D. The Referral Defects in This Case Do Not Implicate Constitutional Concerns ... 14

II. Local Rules Do Not Provide Alternative Grounds for Affirmance 15

TABLE OF CONTENTS—Continued

		Page
III.	Appellate Courts Should Not Review Consent Under §636(c) *Sua Sponte* or Vacate Judgments Based on Technical Referral Defects to Which No Party Objects	16
Conclusion		20

TABLE OF AUTHORITIES

Page

Cases

Archie v. Christian, 808 F.2d 1132 (CA5 1987) (en banc) 12

Ball v. United States, 140 U.S. 118 (1891) 19, 20

Barnhart v. Peabody Coal Co., ___ U.S. ___, 123 S.Ct. 748 (2003) 6

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 17

Caprera v. Jacobs, 790 F.2d 442 (CA5 1986) 13

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 12

Demarest v. Manspeaker, 498 U.S. 184 (1991) 15

Frad v. Kelly, 302 U.S. 312 (1937) 18

Freytag v. Comm'r of Internal Rev. Serv., 501 U.S. 868 (1991) 19

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 18, 19, 20

Gomez v. United States, 490 U.S. 858 (1989) 17

Granfinanciera v. Nordberg, 492 U.S. 33 (1989) 15

Johnson v. Manhattan Ry. Co., 61 F.2d 934 (CA2 1932) 16

Levine v. United States, 362 U.S. 610 (1960) 11

Lytle v. Household Mfg., 494 U.S. 545 (1990) 14, 15

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 15

McDowell v. United States, 150 U.S. 596 (1895) 19, 20

McNeil v. United States, 508 U.S. 106 (1993) 15

TABLE OF AUTHORITIES—Continued

Page

Parks v. Collins, 736 F.2d 313 (CA5 1984) 15, 16

Peretz v. United States, 501 U.S. 923 (1991) 11

Rembert v. Apfel, 213 F.3d 1331 (CA11 2000) 13, 18

Segurola v. United States, 275 U.S. 106 (1927) 11

Silber v. United States, 370 U.S. 717 (1962) 17

Smith v. Shawnee Library Sys., 60 F.3d 317 (CA7 1995) 13

United States v. Bascaro, 742 F.2d 1335 (CA11 1984) 12

United States v. Coleman, 707 F.2d 374 (CA9 1983) 12

United States v. Figueroa, 818 F.2d 1020 (CA1 1987) 12

United States v. Gagnon, 470 U.S. 522 (1985) 11

United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) 6

Wingo v. Wedding, 418 U.S. 461 (1974) 17

Yakus v. United States, 321 U.S. 414 (1944) 12

Constitutional Provisions, Statutes, and Rules

28 U.S.C. §636(b) 1, 8

28 U.S.C. §636(b)(1)(A) 8

28 U.S.C. §636(b)(3) 11

28 U.S.C. §636(c) ..... *passim*

28 U.S.C. §636(c)(1) ..... *passim*

28 U.S.C. §636(c)(2) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

FED. R. CIV. P. 83 3

FED. R. CIV. P. 73 ..... 11, 16

C.D. ILL. R. 72.1(A)(9) 11

D.N.H. R. 73.1(b)(2)(B) 11

S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2 ..... 4, 16

S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.3 4

Other Authorities

BLACK'S LAW DICTIONARY (7th ed. 1999) 2

JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM (Supp. 1994) 11

RESTATEMENT (SECOND) OF CONTRACTS (1981) 12

Magistrate Judges Division of the Administrative Office of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993) 11

ARGUMENT

There is no dispute that the parties in this case made an informed and voluntary decision to proceed before the magistrate judge pursuant to 28 U.S.C. §636(c). Specifically, there is no dispute that: (1) the parties were fully and explicitly informed—no less than five separate times—of their right to consent, or not consent, to the magistrate judge's authority; (2) following notice, Withrow—who now seeks to void the jury verdict and judgment—expressly consented to the magistrate judge's authority, both orally and in writing; (3) defendants never contested the magistrate judge's repeated statements of her understanding that all parties had consented to her authority; and (4) defendants made case-dispositive motions that affirmatively invoked the magistrate judge's authority. The real dispute is whether this clear pattern of conduct, along with defendants' written, post-judgment confirmatory consent, satisfies the terms of §636(c), or whether the statute's requirement of "consent" should be expanded to require express or affirmative manifestations of consent through formal written filings.

I. A TECHNICAL DEFECT IN A §636(C) REFERRAL DOES NOT NEGATE THE PARTIES' VOLUNTARY, INFORMED CONSENT AND, THEREFORE, HAS NO EFFECT ON A MAGISTRATE JUDGE'S AUTHORITY.

A. Consent Is a Question of Substance, Not Form.

Withrow mischaracterizes Petitioners' position by claiming that, "in defendant's view, the Magistrates Act does not require pretrial consent." *See* Resp't Br. 24. Roell, Garibay, and Reagan have never disputed that all parties must consent before a magistrate judge can exercise case-dispositive authority under 28 U.S.C. §636(c). That

congressional mandate is clear from the plain terms of the statute, as observed in Petitioners' opening brief. *See, e.g.*, Pet'r Br. 12-13, 29-31 (discussing 28 U.S.C. §636(c)).

The real dispute is over the meaning of consent—specifically, whether §636(c)'s consent requirement implicates a question of form or substance. Arguing in favor of form, Withrow contends that a party who neglects to document consent in a written pretrial filing fails to confer case-dispositive authority on a magistrate judge. But completing a locally prescribed form does not create consent. It merely *confirms* a party's consent to proceed before a magistrate judge. The underlying consent exists separate and apart from the form because, as even Withrow acknowledges, "consent" is an "agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person." Resp't Br. 14 (quoting BLACK'S LAW DICTIONARY 300 (7th ed. 1999)). And, in crafting §636(c), Congress defined magistrate judges' authority in terms of consent—not execution of a consent form. *See* 28 U.S.C. §636(c)(1).

The plain language of §636(c)(1) belies the notion that consent must be "express" and "affirmative" to confer case-dispositive authority on a magistrate judge. *See, e.g.*, Resp't Br. 17; Pet. App. 3a. Neither adjective appears in the statute. *See* 28 U.S.C. §636(c)(1). Congress required only that magistrate judges' authority be conditioned "[u]pon the consent of the parties" and that such consent be voluntary. *See id.*

The omission of adjectives before "consent" is significant. In the very next sentence of the statute, Congress demonstrated its understanding that "written consent" is a distinct and narrower concept than "consent"—the predicate for §636(c)(1)'s grant of case-dispositive authority to full-time magistrate judges. *See id.*; *cf.* Pet'r Br. 12-15 (contrasting Congress's inclusion of written-consent

requirements in other provisions of the Federal Magistrates Act with §636(c)(1)'s "upon the consent of the parties" language).

Withrow's overview of local rules further highlights that §636(c) does not require consent to be given in a particular form. Indeed, because local rules must be consistent with the statutes they implement, *see* FED. R. CIV. P. 83, the consent variations in local rules implementing §636(c) undermine Withrow's argument that the statute permits only express pretrial consent. *Compare, e.g.*, Resp't Br. App. 1a (referencing Massachusetts local rule requiring written consent within twenty days), *with id.* 5a (noting Oklahoma local rule permitting parties to "consent to magistrate judge jurisdiction at any time during the pendency of the case"), *with id.* 10a (citing New Hampshire local rule under which parties waive their right to an Article III judge by not objecting to magistrate-judge referral within twenty days).

In construing §636(c), this Court should follow the terms of the statute and focus on the substance of consent, not its form. And the Court should decline to engraft additional terms like "express" or "written" onto §636(c)'s consent requirement. Pet. App. 3a-4a, 11a.

Whether parties memorialize consent in a pretrial filing or a post-judgment confirmation, the underlying consent remains the same. And it is that underlying consent that provides a magistrate judge with case-dispositive authority under §636(c). *See* 28 U.S.C. §636(c)(1). Because Congress made consent—not compliance with technical referral procedures—the basis for the grant of case-dispositive authority in §636(c), *compare id., with id.* §636(c)(2), the failure of two defendants to fill out written consent forms prior to judgment did not void the jury's verdict or require the Fifth Circuit to vacate the

final judgment entered by the magistrate judge in this case.

B. The Practical Realities of the Consent Process Should Inform the Court's Construction of §636(c) and Its Determination of the Consequence for Technical Defects in Referral Procedures.

Unable to demonstrate why consent is lacking when parties knowingly and voluntarily litigate the merits of a suit before a magistrate judge, Withrow theorizes that Roell and Garibay secretly withheld consent while outwardly projecting the illusion of agreement to the magistrate judge's authority. But this is not a case in which defendants strategically engineered a defective referral in the hopes of hedging their bets on a jury verdict. Rather, in this case, *all* parties—as well as the district-court clerk, district judge, and magistrate judge—contributed to a series of procedural mishaps that culminated in the magistrate judge's entry of judgment without two defendants' consent forms on file.

First, Withrow neglected to secure all parties' written consent—a duty assigned to plaintiffs under the local rules. *See* S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2 (Br. Opp'n App. 7a). Second, the clerk violated local referral procedures by transmitting to the district judge a consent form that was not signed by all parties. *Id.* Third, the district judge referred the case to the magistrate judge pursuant to §636(c) before any of the defendants had been served, much less consented—which further contravened local rules. *Id.* art. III.B.3 (Br. Opp'n App. 7a); Pet. App. 21a; Resp't Br. 5-6. Fourth, trial counsel for Roell and Garibay—who was assigned this case after it had been referred to the magistrate judge—neglected to check

whether locally prescribed consent forms had been filed on these defendants' behalf.[1] And, fifth, the magistrate judge failed to confirm that all parties' forms were on file before presiding over trial and rendering judgment on the jury's verdict. Pet. App. 19a nn.3-4.

An unfortunate number of errors occurred. But those technical mistakes did not divest the magistrate judge of authority because at no point did she proceed against any party's wishes—*i.e.*, without any party's consent. Instead, the record reflects Withrow's fully informed consent, both orally, J.A. 11, and in writing, Pet. App. 20a—as well as the consent of all defendants, who affirmatively agreed to the magistrate judge's exercise of case-dispositive authority through both their pre-judgment litigation conduct and their post-judgment written confirmation of consent. *See infra* Part I.C; *see also* Pet'r Br. 29-31.

Nothing in the text of §636(c)—or in the history, structure, or purpose of the Federal Magistrates Act—suggests that technical noncompliance with local referral procedures nullifies all proceedings under that section and strips the magistrate judge of authority to enter judgment on a jury

---

[1] The assistant attorney general who represented all defendants at trial and at the Fifth Circuit, Charles Eldred, did not handle the case from its inception. At the preliminary *Spears* hearing, Jean Wong attended but was not assigned to the case. J.A. 9, 11. After the district judge referred the case to the magistrate judge, Pet. App. 21a, defendants were served through another assistant attorney general, Lee Haney. J.A. 12. That service of process contained instructions regarding consent. *Id.* Mr. Eldred then was assigned to defend Roell and Garibay and filed answers on their behalf. 2R.541, 560. But he did not investigate whether consent forms previously had been filed. Ultimately, Mr. Eldred also substituted in as counsel for Reagan, J.A. 2, who at the time of service was represented by private counsel who filed both an answer and consent form on Reagan's behalf. 2R.555, 585.

verdict. *See* Pet'r Br. 16-21 (detailing evolution of the Federal Magistrates Act). And, that severe result would be particularly unjustified when, as here, the parties never objected to the magistrate judge's exercise of case-dispositive authority or claimed that their decision to proceed under §636(c) was anything but knowing and voluntary.

When a statutory grant of authority does not specify a consequence for noncompliance, "the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, ___ U.S. ___, 123 S.Ct. 748, 755 (2003) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993)). In §636(c), Congress delegated the task of developing referral procedures to the district courts; but Congress specified no consequence for noncompliance with local, administrative rules. *See* 28 U.S.C. §636(c)(2). Accordingly, this Court should not ascribe a penalty for noncompliance that would defeat Congress's goals of expediting case resolution and promoting judicial efficiency by facilitating consensual referrals under §636(c). Pet'r Br. 16-21; *cf. Barnhart*, 123 S.Ct., at 762 (declining to construe a statutory time limit as a "jurisdictional" constraint on the Commissioner of Social Security's actions because that reading would defeat Congress's funding objective under the Act). Such a penalty would be particularly inappropriate in the context of §636(c), under which Congress conditioned its grant of case-dispositive authority on the existence of consent—not compliance with local referral procedures. Compare 28 U.S.C. §636(c)(1), *with id.* §636(c)(2).

To further both Congress's intent and litigants' expectations, the Court should look to the practical realities of the referral process and recognize that mistakes inevitably will happen, causing technical defects in §636(c) referrals. But provided that a magistrate judge acts under §636(c) with the parties' knowing and voluntary agreement—and no parties

protest that they were coerced or duped into proceeding before the magistrate judge—consent exists under §636(c), and reviewing courts should respect the magistrate judge's authority to preside over a jury trial and enter judgment.

C. The Judgment Below Is Valid Because All Parties Consented to the Magistrate Judge's Case-Dispositive Authority Under §636(c).

Withrow has never contended that he did not knowingly and voluntarily consent to proceed before the magistrate judge. And, although defendants Roell and Garibay did not file consent forms prior to judgment, they affirmatively demonstrated their consent at every stage of the litigation and never once questioned or objected to the magistrate judge's repeated assertions of authority to preside over the case for all purposes, including entry of final judgment. *See, e.g.*, Pet. App. 26a, 27a; *cf. id.* 21a. Nor did they dispute the magistrate judge's stated understanding that all parties had consented to her authority. Pet. App. 27a.; J.A. 18.

Additionally, defendants did more than "not object" to the magistrate judge's actions. They affirmatively invoked the magistrate judge's authority under §636(c) by requesting case-dispositive rulings prior to trial. *See* J.A. 3; 3R.344, 502. And they expressly confirmed consent in a post-judgment filing with the district court. J.A.5; Pet. App. 22a.

1. Defendants' Pre-Judgment Litigation Conduct Was Not "Ambiguous," as Withrow Erroneously Suggests.

Withrow describes defendants' pre-judgment conduct as "ambiguous," Resp't Br. 16, but the record does not support this characterization. Indeed, the magistrate judge herself concluded that defendants "by their actions . . . *clearly* implied their consent to the jurisdiction of a magistrate." Pet. App. 19a (emphasis added).

Striving for ambiguity, Withrow contends that defendants' pretrial participation did not signal consent under §636(c) because they could have believed such proceedings were conducted under §636(b), which "permits magistrates to preside over pretrial proceedings and non-dispositive matters without first obtaining the parties' consent." Resp't Br. 25 (citing 28 U.S.C. §636(b)). But this characterization of the pretrial proceedings ignores defendants' express requests for *dispositive* rulings from the magistrate judge, which could be made only under §636(c)—and with all parties' consent. *Compare* 28 U.S.C. §636(b)(1)(A), *with id.* §636(c)(1).

Defendants' first invocation of the magistrate judge's case-dispositive authority was their motion for summary judgment. 3R.502. When the magistrate judge denied that motion, J.A. 3; Pet. App. 25a, defendants did not question her authority to make that dispositive ruling. Instead, defendants requested reconsideration of the merits of their arguments. *See* J.A. 3; 3R.344. And, when the magistrate judge again denied their motion, 3R.302, defendants did not challenge that second adverse order or contend that the magistrate judge was exercising case-dispositive authority without their consent under §636(c). To the contrary, they voluntarily proceeded to the next case-dispositive litigation stage: jury trial on the merits with the magistrate judge presiding.[2]

Defendants' affirmative, consensual conduct is not contradicted by two pretrial telephone conferences during

[2] At trial, defendants affirmatively invoked the magistrate judge's case-dispositive authority yet again when, prior to the jury's verdict, they asked the magistrate judge to render judgment as a matter of law. 7R.Supp.2. The magistrate judge denied that motion, and, consistent with all previous instances, defendants raised no objection to her authority to make that adverse ruling.

which Withrow claims defendants "never consented" when the magistrate judge discussed the consent predicate of her authority under §636(c). Resp't Br. 25; *see also id.* 6. Withrow omits that these two conferences concerned the need to obtain consent from a newly served defendant—not from any of the parties already proceeding under §636(c). J.A. 15-16, 18-19. Neither Roell, Garibay—nor, for that matter, Withrow or Reagan—discussed their own consent in these telephone conferences because, at that stage, all participating parties' consent had been clearly evidenced and was beyond question.[3]

Indeed, no one raised doubts about Roell and Garibay's consent until after Withrow lost the jury trial, appealed the adverse final judgment, and the Fifth Circuit *sua sponte* remanded the case for a determination on these two defendants' consent. And, as soon as the Fifth Circuit questioned consent, all defendants immediately executed post-judgment confirmation of their pretrial consent, Pet. App. 22a—which should have erased any doubts about their voluntary agreement to proceed under §636(c).

Roell and Garibay's litigation conduct clearly evidenced their consent to proceed under §636(c). And their post-judgment confirmatory consent was consistent with their pretrial actions. These two defendants' failure to file consent forms prior to judgment did not negate their consent and, consequently, did not strip the magistrate judge of authority to enter judgment on the jury's verdict.

[3] Withrow also states that the assistant attorney general who attended the *Spears* hearing "refused to give consent when first asked to do so," Resp't Br. 24, but the record reflects that the attorney had not been assigned to the case and did not represent the defendants, who at that time had not yet been served and, thus, were not even parties to the case. J.A. 2, 11. Accordingly, she could not have consented on any defendant's behalf.

2. Inferring consent from litigation conduct is neither unprecedented nor inconsistent with §636(c).

Defendants not only invoked the magistrate judge's authority through their litigation conduct, but also expressly memorialized their consent in a post-judgment filing. Even without express post-judgment confirmation, however, the magistrate judge had case-dispositive authority because defendants' litigation conduct manifested the consent necessary to satisfy §636(c).

Contrary to Withrow's assertion, defendants have never stated that inferred consent under §636(c) "is not sufficiently 'protective of Congress' voluntariness concerns.'" Resp't Br. 17. Rather, defendants acknowledged that requiring post-judgment confirmatory consent—in addition to inferred consent from litigation conduct—provides a "*more* protective" approach for ensuring parties' voluntary agreement to proceed under §636(c). Pet'r Br. at 35 n.13 (emphasis added). Defendants also have observed, however, that when a case is referred to a magistrate judge with the parties' full knowledge that the referral encompasses trial and entry of judgment—and the parties voluntarily proceed without objection and without demanding to be heard by an Article III judge—the magistrate judge acts, for all practical purposes, with the parties' consent. *See id.* at 32 n.12.[4]

[4] Although Withrow contends that inferred consent would impermissibly transform §636(c) into an "opt-out" statute, that objection is flawed on two levels. First, litigants who affirmatively invoke a magistrate judge's case-dispositive authority are not passive participants but actively "opt in" to a §636(c) proceeding through their litigation conduct. Second, even if an "opt-out" approach were taken under §636(c), it would be consistent with the statute. *See* Pet'r Br. at 32 n.12 (discussing why opt-out referral procedures comport with Congress's voluntariness concerns under §636(c)). Indeed, the Judicial Conference Committee on the Administration of the Magistrate Judges System expressly endorses use of opt-out procedures "to further the goal of maximizing the consent jurisdiction of magistrate judges in civil cases." JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM 3-4 (Supp. 1994). Withrow erroneously contends that the Committee rejects an opt-out approach under §636(c), *see* Resp't Br. 15 n.7, but he references a proposal the Committee declined to adopt in 1991. *Id.* (citing Magistrate Judges Division of the Administrative Office of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 305 (1993)). Three years later, the Committee expressly endorsed the use of opt-out referral procedures. *See* LONG RANGE PLAN at 3-4.

Inferred consent is not the radical notion Withrow suggests.[5] In *Peretz v. United States*, for example, the Court held that *voir dire* in a felony jury trial may be delegated to a magistrate judge pursuant to §636(b)(3) "when the litigants consent"—including when a defendant "fails to demand the presence of an Article III judge." 501 U.S. 923, 933, 936-37 (1991).[6] Similarly, outside the magistrate-judge context, the

[5] Nor does Federal Rule of Civil Procedure 73 preclude inferred consent. *See* Resp't Br. 15. That rule directs parties to file written consent forms, but it does not establish the *authority* of a magistrate judge to proceed under §636(c). That authority emanates, instead, from the statute's consent requirement. *See* 28 U.S.C. §636(c)(1). Although federal rules have the force of law, the particular rule at issue—Rule 73—prescribes no consequence for noncompliance. *See* FED. R. CIV. P. 73. Accordingly, the Court should not interject a rule-based penalty that nullifies §636(c) authority whenever consenting parties fail to file forms pursuant to Rule 73. *See supra* Part I.A. If that penalty applied, magistrate judges automatically would forfeit case-dispositive authority in every jurisdiction in which local rules do not require written consent, as does Rule 73. *See, e.g.*, C.D. ILL. R. 72.1(A)(9); D.N.H. R. 73.1(b)(2)(B). And that would be inconsistent with Congress's directive that district courts develop their own local rules for ensuring the voluntariness of parties' consent. 28 U.S.C. §636(c)(2).

[6] As the Court noted in *Peretz*, parties frequently waive constitutional rights through their failure to object. *See* 501 U.S. 923, 936-37 (citing *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (right to be present at all stages of criminal trial), *Levine v. United States*, 362 U.S. 610, 619 (1960) (right to public trial), *Segurola v. United States*, 275 U.S. 106, 111 (1927) (right to be free from unlawful search and seizure),

Court has inferred a party's consent to a non-Article III decisionmaker from affirmative litigation conduct in a non-Article III forum. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849-50 (1986) (noting that party's decision to proceed before the commission rather than pursue relief in state or federal court "constituted an effective waiver" of any right to trial in an Article III court on a counterclaim).

Inferred consent also is appropriate because the parties' agreement to proceed before a magistrate judge is, in essence, a "matter of contract." *See Archie v. Christian*, 808 F.2d 1132, 1134 n.2 (CA5 1987) (en banc). And contract principles permit a party's affirmative conduct to signify consent. In the formation of contracts, for example, parties can fulfill the requisite "[m]anifestation of mutual assent" by beginning or rendering performance. RESTATEMENT (SECOND) OF CONTRACTS §18 (1981). Conduct can communicate a party's acceptance of an offer and create a binding obligation. *Id.*, §19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *see also id.*, cmt. a ("Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise."); *id.*, §4 (permitting a promise to be "inferred wholly or partly from conduct"). Thus, when—as in this case—all parties are on notice that the magistrate judge is exercising case-dispositive authority, and all

United States v. Figueroa, 818 F.2d 1020, 1025 (CA1 1987) (right not to be subjected to unlawful post-arrest delay), *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (right to double jeopardy defense), *United States v. Coleman*, 707 F.2d 374, 376 (CA9 1983) (right not to incriminate oneself), and *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.")).

voluntarily proceed on dispositive motions and a jury trial, the parties' "manifestation of mutual assent" establishes their agreement—*i.e.*, their consent—to litigate pursuant to §636(c).

Moreover, construing §636(c) to permit inferred consent offers the added benefit of preventing gamesmanship—which Withrow, like the Fifth Circuit, emphasizes as a concern. In this respect, inferred consent may be more appealing than either a post-judgment or express-pretrial consent approach—neither of which fully resolves gaming concerns. *See Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (CA7 1995); *see also Caprera v. Jacobs*, 790 F.2d 442, 445 (CA5 1986) (per curiam).[7]

An inferred-consent approach would prevent gamesmanship by preventing parties who knowingly and voluntarily proceeded to trial before a magistrate judge from denying consent upon receipt of an adverse verdict.[8] Instead, consent would be reflected in the parties' affirmative litigation conduct, establishing the magistrate judge's

[7] Withrow claims that permitting post-judgment confirmatory consent would make retrials "the normal operation of the rule," Resp't Br. 20, but that has not happened in circuits like the Seventh and Eleventh that accept post-judgment consent. Instead, only a handful of examples exist. *See, e.g., Rembert v. Apfel*, 213 F.3d 1331, 1335 & n.1 (CA11 2000). And, while Withrow's pretrial, express-consent construction of §636(c) similarly has not spawned a large body of jurisprudence, case law documents that gamesmanship occurs under Withrow's proposed approach as well. *See Caprera*, 790 F.2d, at 445.

[8] A party might argue that its affirmative litigation conduct did not evidence a knowing and voluntary agreement to proceed before the magistrate judge; but that party would have to rebut the inference of consent that otherwise is legitimately drawn when parties are on notice that a magistrate judge is exercising §636(c) authority and those parties proceed through judgment on the merits. In this case, of course, neither Withrow nor any of the defendants suggest that they did not voluntarily and knowingly consent to proceed before the magistrate judge pursuant to §636(c).

case-dispositive authority under §636(c).[9] Thus, if eliminating gamesmanship is the goal in construing the statute's consent requirement, the Court should read §636(c) to permit inferred consent and hold parties to the bargain they struck when they voluntarily proceeded to trial before a magistrate judge.

D. The Referral Defects in This Case Do Not Implicate Constitutional Concerns.

Withrow contends that the doctrine of constitutional avoidance requires rejection of defendants' construction of §636(c), but this argument rests on the fiction that defendants' approach would permit magistrate judges to exercise case-dispositive authority without all parties' consent. *See* Resp't Br. 24 (arguing that "defendants' view [that] the Magistrates Act does not require pretrial consent" casts "constitutional doubt on the entire referral process"). As previously discussed, defendants agree that Congress conditioned its grant of case-dispositive authority under §636(c) on the parties' knowing and voluntary consent to proceed before a magistrate judge. *See supra* Part I.A. Accordingly, defendants' construction of §636(c) raises no constitutional concerns.[10]

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[9] An inferred-consent approach may not have the immediate appeal of a bright-line rule, and sound policy reasons may well favor local adoption of clear-cut, written-consent requirements. But an inadvertent failure to comply with a local precautionary measure should not be deemed to divest a magistrate judge of all statutory authority, as that would be contrary to the plain language and purpose of §636(c). Nor should such a procedural error render a jury verdict a nullity when no party objects.

[10] At base, Withrow's argument is an attempt to back-door a constitutional challenge to §636(c) that is not before the Court because it was not included in the question presented on certiorari and was neither pressed by Withrow nor passed upon by the courts below, depriving the Court of "the benefit of a full record or lower court determinations." *Lytle v. Household Mfg.*, 494 U.S. 545, 551 n.3 (1990); *see, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (1989); *see also* Reply to Br. Opp'n 7-9.

II. Local Rules Do Not Provide Alternative Grounds for Affirmance.

Withrow erroneously argues that the Court should affirm the Fifth Circuit's judgment on the alternative ground that defendants failed to file written pretrial consent as required by the Southern District of Texas local rule. As Withrow concedes, this argument was never raised in the courts below. Resp't Br. 28 n.9. Accordingly, it is not properly before this Court. *See, e.g., Matsushita*, 516 U.S., at 379 n.5; *Demarest*, 498 U.S., at 188-89; *Lytle*, 494 U.S., at 551 n.3; *Granfinanciera*, 492 U.S., at 38-39.[11]

Nor, as Withrow suggests, is the local-rule issue so "intertwined" with the meaning of "consent" under §636(c) that it must be considered by the Court. Resp't Br. 28 n.9. The statute conditions magistrate judges' authority on the parties' consent, not compliance with local rules. *Compare* 28 U.S.C. §636(c)(1), *with id.* §636(c)(2); *see supra* Part I.A. Thus, even if Withrow's local-rules argument had been preserved, it is immaterial to whether the magistrate judge had case-dispositive authority under §636(c). *Cf. Parks v. Collins*, 736 F.2d 313, 314-15 (CA5 1984) (confirming that magistrate judges' authority stems from the parties' consent and that noncompliance with local referral rules does not negate consent when parties freely and voluntarily proceeded before the magistrate judge).

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[11] Withrow's *pro se* status in the courts below does not excuse his failure to preserve this argument. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) (explaining that "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel").

Moreover, Withrow faults defendants for failing to file their consent forms but ignores his own violation of the local rules, which assign plaintiffs the burden of securing all parties' written consent. S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2 (Br. Opp'n App. 7a). It would be perverse for Withrow to obtain a new trial—based on a local-rule violation—when he himself failed to obey the local rules.

Certainly, all parties—as well as the clerk of court, district judge, and magistrate judge, *see supra* Part I.B—should have abided by local referral procedures designed to ensure the voluntariness of parties' conduct. *See* 28 U.S.C. §636(c)(2); FED. R. CIV. P. 73. But this technical error is harmless when no party—including Withrow—contends that the magistrate judge proceeded without that party's knowing and voluntary consent. *Cf. Parks*, 736 F.2d, at 314-15; *Johnson v. Manhattan Ry. Co.*, 61 F.2d 934, 938 (CA2 1932) (noting, in rejecting challenge to judge's authority based on alleged rule violation, that "for obvious practical reasons not all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end").

III. APPELLATE COURTS SHOULD NOT REVIEW CONSENT UNDER §636(C) *SUA SPONTE* OR VACATE JUDGMENTS BASED ON TECHNICAL REFERRAL DEFECTS TO WHICH NO PARTY OBJECTS.

Withrow concedes that a defect in referral procedures under §636(c) does not implicate subject-matter jurisdiction. Resp't Br. 29. Nonetheless, Withrow strains to defend the Fifth Circuit's *sua sponte* consideration of consent by suggesting that magistrate-judge authority under §636(c)

is "akin" to subject-matter jurisdiction. *Id.* Tellingly, Withrow cites no authority for this proposition.[12]

Nor does *sua sponte* consideration of consent derive support from *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), which involved subject-matter jurisdiction—an issue Withrow concedes is not at issue under §636(c). Resp't Br. 29. Additionally, Withrow misplaces reliance on an assortment of criminal cases in which defendants objected to alleged trial-court errors and in which, therefore, this Court did not address the propriety of *sua sponte* review. *See Gomez v. United States*, 490 U.S. 858, 876 (1989); *Wingo v. Wedding*, 418 U.S. 461, 465-66 (1974); *Silber v. United States*, 370 U.S. 717, 718 (1962).[13]

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[12] Defendants did not waive their challenge to the Fifth Circuit's *sua sponte* investigation of consent by not protesting that action in the district court or in subsequent appellate briefing. Resp't Br. 28-29. Because the Fifth Circuit already had addressed consent as a jurisdictional inquiry in its *sua sponte* limited remand order, defendants had no avenue to challenge the legal foundation of that order, which bound the district court and framed the consent inquiry for the Fifth Circuit merits panel. In Fifth Circuit briefing, defendants tracked language in the Fifth Circuit's limited remand order, noting in the "Standard of Review" section that "jurisdictional questions" are reviewed *de novo*. *See* Appellees' Br. 2, *Withrow v. Roell*, No. 00-40627, in the U.S. Court of Appeals for the Fifth Circuit. But the issues and argument sections consistently framed questions in terms of the *magistrate judge*'s jurisdiction (*i.e.*, authority) to conduct the trial and to enter judgment—not the existence of subject-matter jurisdiction over Withrow's §1983 suit. *See id.*, 1-5.

[13] Withrow argues that appellate courts should investigate consent *sua sponte* because a judgment rendered by a magistrate judge without consent is "of no force and effect" and "cannot be overlooked." Resp't Br. at 40-41. But, if a judgment truly is rendered without a party's consent—*i.e.*, without that party's voluntary agreement—the party need only object to alert the district and appellate courts to that defect. *Sua sponte* investigation serves no salutary purpose in that instance. Instead, it will tend to uncover, as in this case, technical defects in referral procedures that do not void the parties' underlying consent and, therefore, do not affect the magistrate judge's authority. If, however,

Similarly inapplicable is *Glidden Co. v. Zdanok*, which involved an unpreserved constitutional challenge to the authority of judges appointed to the Court of Claims and Court of Customs and Patent Appeals. 370 U.S. 530, 535-36 (1962). *Glidden* is inapposite for two reasons. First, Withrow does not challenge the constitutionality of §636(c) in this case. *See supra* Part I.D & note 10. And, second, the Court in *Glidden* merely permitted a party to raise a constitutional-authority challenge for the first time on appeal. The case did not involve *sua sponte* appellate investigation of a lower-court judge's authority. *See id.*

Another authority-related case on which Withrow misplaces reliance is *Frad v. Kelly*, 302 U.S. 312 (1937), which invalidated an order issued by a judge who lacked statutory authority to revoke probation and terminate proceedings under the Probation Act. This defect in authority was substantive because the judge's order fell not only outside the scope of the Act's grant of authority, but also outside the subject-matter jurisdiction of the court in which the judge sat. *Id.*, at 316-19. In Withrow's case, by contrast, the magistrate judge acted within the scope of §636(c)'s grant of authority because all parties knowingly and voluntarily agreed to proceed before the magistrate judge. *See* 28 U.S.C. §636(c)(1).[14] Any procedural defect in the referral

appellate courts do consider consent *sua sponte* and find consent lacking, the proper action would be to treat the judgment as an interlocutory report and recommendation and dismiss for lack of appellate jurisdiction, *see, e.g., Rembert*, 213 F.3d, at 1335—not to vacate the trial-court judgment, as did the Fifth Circuit in Withrow's appeal.

[14] Additionally, the objecting party in *Frad* was a United States Attorney acting on the public's behalf, and the Court has subsequently limited *Frad*'s holding to that factual circumstance. *See Glidden*, 370 U.S., at 535. In Withrow's case, of course, that defining element is absent.

process did not strip the magistrate judge of authority or divest the district court of subject-matter jurisdiction over Withrow's §1983 suit.[15]

Moreover, when, as in this case, a defect in a magistrate-judge referral is purely technical, the judgment should be respected under the "*de facto* officer" doctrine. That doctrine confers validity upon acts performed under color of official title even if minor deficiencies are later discovered in the person's appointment or election to office. *See, e.g., Glidden*, 370 U.S., at 535; *McDowell v. United States*, 150 U.S. 596, 602 (1895); *Ball v. United States*, 140 U.S. 118, 128-29 (1891). By giving effect to such acts, the *de facto* officer doctrine promotes finality and conservation of judicial and litigant resources, preventing litigants from "abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden*, 370 U.S., at 535.

Because the magistrate judge who presided over Withrow's trial was a "full-time judicial officer . . . specially designated" to exercise case-dispositive authority pursuant to §636(c)(1)—and because she and all parties proceeded on the

[15] Even assuming that the absence of two defendants' consent forms is a non-jurisdictional "structural" defect, as Withrow claims, *see* Resp't Br. 29, Withrow waived the issue by not raising it in the district court. As Justice Scalia has observed, "[a] party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial." *Freytag v. Comm'r of Internal Rev. Serv.*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring). The *Freytag* majority considered an Appointments Clause challenge to a tax-court judge, noting that *Glidden* had included that specific type of challenge among the non-jurisdictional, structural constitutional objections that can be considered even if not preserved below. The Court stated, however, that this was a "rare" case warranting discretionary consideration. *Id.*, at 878-79. And the Court did not decide whether, as Justice Scalia urged, structural constitutional claims are forfeited if not timely raised. *See id.*, at 893 (Scalia, J., concurring).

shared (albeit erroneous) understanding that the requisite consent forms had been properly filed with the clerk of court—the *de facto* officer doctrine immunized the trial-court judgment from attack based on a technical defect in referral procedures. *See Glidden*, 370 U.S., at 535; *McDowell*, 150 U.S., at 602; *Ball*, 140 U.S., at 128-29. Moreover, to the extent any defect was not immunized under that doctrine, it was cured when defendants filed their post-judgment confirmatory consent. There was no basis for the Fifth Circuit to investigate consent *sua sponte* and vacate the final judgment when no party claimed the magistrate judge proceeded without that party's voluntary consent.

CONCLUSION

The Court should reverse the Fifth Circuit's judgment.

Respectfully submitted,

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